Supreme Court, U.S.
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No. 95-OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CAPTAIN YOLANDA HUET-VAUGHN,
UNITED STATES ARMY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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(On behalf of the
NATIONAL EMERGENCY
CIVIL LIBERTIES COMMITTEE)

December 22, 1995

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QUESTION PRESENTED

Whether depriving a criminal defendant charged with a specific intent crime of her right to testify and present other evidence concerning her intent marks an unacceptable departure from established standards of due process and negates an essential element of the specific-intent crime of desertion.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.1 LIST

The parties to the proceedings below were:

The United States
Captain Yolanda M. Huet-Vaughn

Petitioner Captain Yolanda M. Huet-Vaughn is an individual and hence has no parent companies, subsidiaries or affiliates.

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Captain Yolanda M. Huet-Vaughn petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The September 28, 1995 decision of the United States Court of Appeals for the Armed Forces is reported at 43 M.J. 105 (C.A.A.F. 1995). (7a.)[1/] The January 25, 1994 decision of the Army Court of Military Review (now the Army Court of Criminal Appeals) on reconsideration is reported at 39 M.J. 545 (A.C.M.R. 1994). (38a.) The October 29, 1993 decision of the ACMR, which was vacated upon that court's reconsideration, was unreported.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Armed Services was rendered on September 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions involved in this petition are set forth in the appendices attached hereto. (1-6a.)

INTRODUCTION AND STATEMENT OF THE CASE

Captain Yolanda Huet-Vaughn is a physician and mother of three who joined the Army Reserves in June, 1990, shortly before Iraq invaded Kuwait in August 1990. In civilian life,

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1/ References to "___a" are to pages of the appendices to this petition.

Captain Huet-Vaughn practices medicine in Kansas City, Kansas, serving a relatively poor community and frequently offering her medical services to patients at reduced or no cost. Captain Huet-Vaughn was charged with desertion after she absented herself from the army from December 31, 1990 until February 2, 1991, when she voluntarily returned to military custody. The single charge against her was "desertion with intent to avoid hazardous duty or to shirk important service" in violation of Article 85 of the Uniform Code of Military Justice ("U.C.M.J."), 10 U.S.C. § 885. Captain Huet-Vaughn pleaded not guilty to this charge.

Captain Huet-Vaughn did not dispute that she was absent from the armed forces without leave (a lesser included offense of desertion), but maintained that she lacked the intent required for desertion. Nonetheless, a general court-martial convicted her of desertion in August, 1991, and she was sentenced to dismissal from the service, confinement for 30 months, and forfeiture of all pay and allowances. The convening authority reduced the period of confinement to 15 months on December 3, 1991.

Although desertion is a specific intent crime, requiring the accused to have had the intent to avoid hazardous duty or to shirk important service, the military judge presiding over Captain Huet-Vaughn's court-martial proceedings repeatedly ruled (and instructed the members of the court-martial accordingly) that evidence of Captain Huet-Vaughn's intent in absenting herself from duty was irrelevant to her prosecution. The judge excluded both the testimony of Captain Huet-Vaughn and her proposed witnesses on the issue of her intent.

After her conviction, Captain Huet-Vaughn remained in custody for approximately eight months until April 6, 1992, when the Deputy Assistant Secretary of the Army for the Department of the Army Review Boards and Equal Opportunity Compliance and Complaints Review ordered her release, and remitted the remainder of her sentence.

Captain Huet-Vaughn appealed her conviction to the United States Army Court of Military Review (hereinafter "ACMR") which set aside the conviction and sentence on October 29, 1993. The government moved for reconsideration and, on January 25, 1994, the ACMR on reconsideration again ruled in Captain Huet-Vaughn's favor.

The Judge Advocate General certified the case to the Court of Appeals for the Armed Forces (previously the Court of Military Appeals) (hereinafter "CAAF") under 10 U.S.C. 867(a)(2), and that court reversed the decision of the ACMR on September 28, 1995.

A. The Trial

The government filed two motions *in limine* prior to Captain Huet-Vaughn's trial. The first sought to exclude from evidence "any documentary or testimonial evidence of any sort during the case on the merits concerning the accused's alleged status as a conscientious objector; the dictates of her conscience, religion or personal philosophy; her pattern of belief concerning the Persian Gulf conflict and war generally; and her world views." (10a.) The ostensible grounds for this motion were that the evidence was irrelevant and that it "would confuse the issues, mislead the members, or be a waste of time." (10a.) The second motion sought to exclude "any documentary or testimonial evidence of any sort . . . concerning the legality of the conflict in the Persian Gulf or the legality of Presidential authority to order members of the armed forces to Southwest Asia." (10-11a.) The government argued that the legality of the war was an irrelevant political question. (11a.)

Captain Huet-Vaughn argued that the evidence sought to be excluded by these motions was relevant to her defense that she did not intend to avoid hazardous duty or shirk important service, because it showed that her intent was instead to speak out and expose to the Congress and the American public what she reasonably believed to be an impending catastrophe in terms

of human life, health and the environment as well as impending violations of international law, all in an effort to prevent the outbreak of hostilities. (58-73a.) The evidence was also relevant to prove that Captain Huet-Vaughn honestly and reasonably believed international law, including the Nuremberg principles, prohibited her from participating in violations both of international law and her oath as a physician, and that her intent was to seek to prevent such violations from occurring.

The military judge granted both the government's motions, ruling that Captain Huet-Vaughn's reasons for leaving her unit were irrelevant, as long as the foreseeable effect of her actions was that she would avoid the specified duty. (58a.) The court rejected Captain Huet-Vaughn's arguments that she was entitled to introduce evidence concerning her specific intent at all relevant times. (64-69a, 82-86a.)

Pursuant to its ruling, the court also denied Captain Huet-Vaughn's requests to subpoena and depose numerous witnesses (74-82a), thereby precluding her from calling and examining witnesses (*see, e.g.*, 119-20a), or introducing documentary evidence which would tend to show her actual specific intent (and thus contest one of the elements of the charged offense).

The military judge repeatedly restricted Captain Huet-Vaughn's own testimony regarding what her intent was when she left her unit. An example of the judge's rulings follows:

> Q. . . . What was your intent at the time you went AWOL?
>
> A. My intent at that time was--to expose the nature of what I knew--
>
> TC: Objection Your Honor.
>
> MJ: Restate your question.

* * *

Q: Was your intent at the time you went AWOL for the purpose of avoiding hazardous duty or important service in the Persian Gulf?

A: No, it was not.

Q: What was your intent.

A: My intent at--at the time that I left was to withdraw my consent from what I saw as an illegal and--and totally unnecessary catastrophe.

TC: Objection, Your Honor.

MJ: Sustained, sustained.

(106-08a; *see also* 101-02a, 112a, 113a.) Defense counsel was not permitted to ask the question again, and Captain Huet-Vaughn was not permitted to testify as to what her intent had been. (108-11a.)

On cross-examination, the prosecution asked Captain Huet-Vaughn directly whether she "left Fort Riley so [she] wouldn't have to support Operation Desert Storm or Desert Shield." (113a.) When she responded by explaining her intent, the prosecution objected and asked her to just respond yes or no. (114a.) Captain Huet-Vaughn then testified that she did not leave to avoid deployment to Southwest Asia. (113-16a.)

Not only did the court's rulings preclude Captain Huet-Vaughn from calling witnesses or introducing evidence tending to prove that she did not act with the intent to avoid hazardous duty, but the military judge instructed the members of the court that it *could not* consider any such matter as part of Captain Huet-Vaughn's defense. For example, during voir-dire of the jury members, when defense counsel asked a potential member

whether he would be willing to consider "matters of conscience" both on the merits and on the sentence, the judge instructed: "I --don't answer that question. I've already instructed them that matters of conscience are not to be considered on the merits." (91a.) During direct examination of Captain Huet-Vaughn, when the prosection objected to a question about how she came to have reservations about military operations in the Persian Gulf, the judge stated:

> Well, if what you're trying to get from her is what her--her moral approach was to this, her religious approach, and her personal philosophies with regard to what was going on, I've already explained to the court and--and to you that those are in no way a defense to this, and *therefore they're not relevant.*

(101a (emphasis added).) The judge also instructed that:

> To consciously, intentionally quit one's unit to avoid hazardous duty and/or important service because of one's conscience, religion, personal philosophy, ethical or professional considerations, is not a defense. Any belief by the accused that what she might have been required to do could have been in violation of international law is not a defense.

(120a.)

The military judge similarly refused a specific instruction requested by Captain Huet-Vaughn that:

> [i]t is a defense in this case that the accused did not intend to avoid hazardous duty or shirk

> important service and instead had a different intent.

(120-21a.)

B. The Decision of the Army Court of Military Review

The Army Court of Military Review reversed Captain Huet-Vaughn's conviction, concluding that the military judge "severely hampered appellant's defense strategy to contest the specific intent element of desertion" and holding accordingly that "the military judge committed prejudicial error when he restricted the appellant from testifying and presenting other evidence of motive to contest the element of specific intent charged in the desertion offense." (54-55a.)

The ACMR found that the military judge never permitted Captain Huet-Vaughn to "go beyond a sketchy summary" as she attempted to explain her intent. (47a.) Holding that, "[w]hile evidence of her motive is not an affirmative defense to desertion, it may be considered by the trier of fact to determine whether the appellant had the specific intent charged in the desertion offense, i.e. to avoid hazardous duty or shirk important service" (54a), the ACMR noted that:

> Of the ten government witnesses who testified on the merits, [two] testified to oral statements made by the appellant to prove that the appellant intended to avoid hazardous duty or shirk important service. None of the appellant's eighteen witnesses who testified on the merits, however, were allowed to testify in any manner that would contest the element of intent.

(46-47a.)

The ACMR cited to sixteen cases decided by the military courts over "the past forty-two years where an accused charged with desertion pled not guilty and presented evidence on the merits in an effort to contest or explain that his intent was other than to remain away permanently [an intent which Captain Huet-Vaughn was not charged with having], or to avoid hazardous duty, or to shirk important service." (52a.)

C. The Decision of the Court of Appeals for the Armed Forces

Ignoring--and in effect overruling--decades of military-law precedent (cited in the AMCR's decision), permitting those accused of desertion to testify to and explain their intent, the Court of Appeals for the Armed Forces held that "the military judge did not err in ruling that CPT Huet-Vaughn's motives were irrelevant to the question whether she quit her unit with intent to avoid hazardous duty or shirk important service." (30a.)

In so holding, the CAAF relied on a section of the Manual for Courts Martial (hereinafter "M.C.M.") explaining an entirely different charge, "wilfully disobeying superior commissioned officer," which states that "the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order." (33a.) *See* M.C.M. Part IV, § 14c(2)(a)(iii) (1984, as amended 15 Nov. 1990). (5-6a.)

One member of the CAAF dissented in part, believing that "it was error for the military judge to prevent CPT Huet-Vaughn from explaining her state of mind at the time she left her unit" because "under our case law CPT Huet-Vaughn's mental processes were relevant to determine whether she had an intent to avoid hazardous duty or shirk important service . . . ." The dissenting court member, however, believed that the military judge's error was harmless. (36-37a.)

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS FOR THE ARMED FORCES LAYS DOWN AN EVIDENTIARY RULE FOR ALL MILITARY DESERTION PROSECUTIONS WHICH DEPARTS FROM ESTABLISHED DUE PROCESS STANDARDS AND IMPROPERLY NEGATES AN ESSENTIAL ELEMENT OF THE CRIME.

The CAAF's decision approving the military judge's ruling *in limine* now requires the government to prove only that a defendant accused of desertion knowingly missed hazardous duty or important service, eliminating the statutory requirement that the government prove that the defendant harbored a specific intent to avoid hazardous duty or important service. This short cut to proof of guilt is directly analogous to the outlawed jury instruction that a defendant is presumed to intend the natural and probable consequences of her actions, *Sandstrom* v. *Montana*, 442 U.S. 510 (1979); once it is shown that the accused knew that she was required for hazardous duty or important service and missed such duty or service, her specific intent to avoid the duty or service is presumed and she has no right to testify otherwise.[2/] Because the judge created an impermissible presumption of intent, he precluded Captain Huet-Vaughn from testifying fully herself or presenting the testimony of her witnesses on the question of her intent. She was thus prevented from contesting the government's contention that she intended to avoid hazardous duty or shirk important service.

Although the statutory definition of desertion requires that a defendant have acted with the intent to avoid hazardous

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[2/] Simply to state this proposition is to expose its error. *See, e.g.*, *United States* v. *Conales*, 744 F.2d 413, 434 (5th Cir. 1984) ("the trial court may under *no* circumstances withdraw any element of an offense from the jury's consideration in a criminal case").

duty or to shirk important service, the CAAF's decision now encourages military courts to prevent defendants from contesting this essential element of the offense. If the CAAF's decision is followed, as it must be, by the lower military courts,[1] a defendant's specific intent is thus henceforward effectively presumed in desertion cases.

Desertion is a serious offense, punishable in time of war by death and at other times by imprisonment for up to five years, dishonorable discharge and forfeiture of pay. 10 U.S.C. § 885(e), U.C.M.J. Art. 85, M.C.M. Part IV, § 9. Thus, under the CAAF's decision, an individual could be put to death for the crime of desertion without an opportunity to stand before the trier of fact and testify what her actual intent was when she missed the duty at issue. This perversion of hitherto settled law should not stand as precedent for future military prosecutions.

1. The CAAF's Decision Violates Established Due Process Standards By Permitting Military Courts To Exclude Evidence Concerning The Intent Of One Accused Of Desertion, Although The Government Is Statutorily Required To Prove Specific Intent In A Desertion Prosecution.

The government was required to prove five elements in prosecuting Captain Huet-Vaughn for desertion: (1) that she quit her unit, organization or other place of duty; (2) that she did so with the intent to avoid a certain duty or shirk a certain service; (3) that the duty to be performed was hazardous or the service important; (4) that she knew that she would be required

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[1] *See, e.g.*, *United States* v. *Jones*, 23 M.J. 301, 302 (C.M.A. 1987) ("a Court of Military Review is not generally free to ignore our precedent"); *United States* v. *White*, 39 M.J. 796, 804 (N.M.C.M.R. 1994) ("[a] Court of Military Review is bound to follow precedent established by . . . the United States Court of Military Appeals").

for such duty or service; and (5) that she remained absent until the date alleged. M.C.M. Part IV, § 9b(2). (2-3a.)

Thus, one of the elements that the government was expressly required to prove was that Captain Huet-Vaughn acted with the specific intent to avoid hazardous duty and/or important service. *Cf. United States* v. *Guest*, 383 U.S. 745, 760 (1966) (in prosecution under 18 U.S.C. § 241, specific intent to interfere with federal right to interstate travel must be proven and jury must be so instructed; mere conspiracy to rob an interstate traveler would not violate the statute absent the specific intent). Captain Huet-Vaughn's defense was that she did not act with the intent to avoid hazardous duty or important service, but the military judge severly curtailed her ability to testify as to her true intent or to present other evidence in support of this defense.

A. The CAAF's decision contravenes due process standards entitling a criminal defendant to present evidence relevant to the defense.

The CAAF's decision--which now sets forth the standard for all courts martial to follow in prosecutions for desertion--departs startlingly from principles of due process so long established by this Court as to have seemed beyond question. The CAAF simply disregarded the fact that a defendant's right to present evidence to contest all elements of a criminal charge has for decades been recognized as fundamental to due process. Alarmingly, the court's decision now sets forth a new lower due process standard for military desertion prosections than is generally applicable to other criminal prosecutions. In approving the military judge's prohibition of Captain Huet-Vaughn's evidence on intent, the CAAF placed a constitutionally unacceptable limitation on the fact finder's basic ability to "decide where the truth lies." *Washington* v. *Texas*, 388 U.S. 14, 19 (1967).

It is fundamental that due process guarantees the right to present an effective defense. This right is "basic in our system of jurisprudence." *In re Oliver*, 333 U.S. 257, 273 (1948) (footnote omitted).

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, *the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.* Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. *Texas*, 388 U.S. at 19 (emphasis added). The Sixth Amendment to the United States constitution and the due process clause of the Fifth Amendment vouchsafe a criminal defendant the right to defend a charge "in a manner now considered fundamental to the fair administration of American justice--through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses and the orderly introduction of evidence." *Faretta* v. *California*, 422 U.S. 806, 818 (1975).

In *Washington*, this Court struck down a state rule which excluded the testimony of individuals charged as principals, accomplices, or accessories in the trial of another accused of the same crime. In *Webb* v. *Texas*, 409 U.S. 95, 98 (1972) (*per curiam*), this Court summarily reversed a conviction where the trial judge's threatening remarks effectively prevented the defendant's sole witness from testifying. In *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973), this Court held that a prohibition on the defendant cross-examining a witness who had

signed but then repudiated a sworn confession, and on the defendant calling witnesses to corroborate that confession, denied the defendant "a trial in accord with traditional and fundamental standards of due process."

The basic principle of these and scores of other cases is simple: a defendant "is constitutionally entitled to have the court accept in evidence any proffered testimony which is both admissible and vital to his defense." *Rosario* v. *Kuhlman*, 658 F. Supp. 1408, 1413 (S.D.N.Y. 1987), *aff'd*, 839 F.2d 918 (2d Cir. 1988). Captain Huet-Vaughn was thus entitled--indeed constitutionally guaranteed the right--to defend herself by contesting any or all of the elements of the desertion offense with which she was charged, including the intent element. *Cf. Morissette* v. *United States*, 342 U.S. 246, 274 (1952) (the trial court may not withdraw or prejudge the issue [of intent]"). She was not, however, permitted to do so. Moreover, the judge's error took the most egregious form possible by abridging Captain Huet-Vaughn's own testimony about her intent.

B. The CAAF's decision contravenes established federal criminal jurisprudence on the issue of intent.

The CAAF's decision not only contravenes general standards of due process in criminal trials, but also goes against established law on the particular question of a defendant's right to present evidence concerning his or her intent. A determination of whether an accused acted with the requisite intent for conviction must be determined "*not only from the act* . . . but from that together with defendant's testimony and all of the surrounding circumstances." *United States* v. *Morissette*, 342 U.S. 246, 276 (1952) (emphasis added). The accused must be allowed to testify, and the surrounding circumstances must be fully elucidated for the jury since intent "ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind." *United States* v.

Simmons, 610 F. Supp. 295, 302 (D.C. Tenn. 1984), *aff'd*, 756 F.2d 453 (6th Cir. 1985).

This Court has unequivocally stated that, "It goes without saying that matters of intent are for the jury to consider." *McCormick* v. *United States*, 500 U.S. 257, 270 (1991).[4/] Other courts have, of course, agreed with this truism. *See, e.g.*, *United States* v. *Toro*, 840 F.2d 1221, 1231 (5th Cir. 1988) ("whether the defendant had the criminal intent required for conviction is a jury issue"); *United States* v. *Malsom*, 779 F.2d 1228, 1233 (7th Cir. 1985) ("[w]hether or not the necessary intent was established is in all cases a question for the trier of fact to resolve"); *United States* v. *Henry*, 749 F.2d 203, 213 (5th Cir. 1984) ("criminal intent is a 'subjective determination,' an 'issue for the jury to resolve on the basis of circumstantial evidence under the totality of the circumstances'") (quoting *United States* v. *Greenfield*, 554 F.2d 179, 183 (5th Cir. 1977)). As a necessary corollary to the rule that issues of intent are for a jury to decide, a trial judge may never enter a directed verdict in a criminal case, "regardless of how overwhelmingly the evidence may point in that direction." *Connecticut* v. *Johnson*, 460 U.S. 73, 84 (1983) (citing *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977)).

The importance of allowing an accused to present evidence concerning her intent was established in the seminal case of *Morissette* v. *United States*, in which this Court held it impermissible to withhold evidence of a defendant's intent

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4/ Even in civil cases, courts have held that any and all evidence that might bear on intent should usually be submitted to a jury. *See, e.g., In re Air Disaster at Lockerbie, Scotland On December 21, 1988*, 37 F.3d 804, 819 (2d Cir. 1994) ("[n]o evidence which bore event remotely on [state of mind] should have been kept from the jury, unless it interjected tangential and confusing elements which clearly outweighed its relevancy"), *cert. denied*, __ U.S. __, 115 S. Ct. 934 (1995); *Vinieris* v. *Byzantine Maritime Corp.*, 731 F.2d 1061, 1064 (2d Cir. 1984) (same).

when, as in the case of a desertion prosecution, such intent is an element of the crime charged. In *Morissette*, the defendant was convicted of converting government property after he removed spent bomb casings from a practice bombing range. This Court reversed the conviction, holding that the government failed to prove the necessary intent where Morissette might have believed that the spent casings were simply unwanted junk rather than "property" of the United States, and therefore might not have had the intent to convert government property. The Court found that in such circumstances the existence of a defendant's intent "is a question of fact which must be submitted to the jury." 342 U.S. at 274. *See also Rose* v. *Clark*, 478 U.S. 570, 582 n. 11 (1986) ("the determination of guilt or innocence, according to the standard of proof required by *Winship* and its progeny, is for the jury rather than the court"); *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 435 (1978) ("[intent] is not be taken from the trier of fact through reliance on a legal presumption of wrongful intent").

In *United States* v. *Kelly*, 888 F.2d 732 (11th Cir. 1989), the court held similarly that a lawyer charged with aiding and abetting a client and conspiring with the client to possess cocaine should have been permitted to testify that he believed his professional obligations required him to act as he did. The trial court excluded this evidence as irrelevant, but the appellate court reversed on the grounds that the evidence "was very relevant to [the defendant's] intent and state of mind," and formed "the basis of his primary defense." *Id.* at 743. The same is true of Captain Huet-Vaughn's testimony concerning her motives and belief that her professional obligations required her to act as she did.

Under the holdings of *Morissette* and *Kelly*, Captain Huet-Vaughn should have been permitted to testify as to her intent, and her witnesses should have been allowed to testify as to "all of the surrounding circumstances." A trial court's discretion to exclude evidence "'does not . . . extend to the exclusion of crucial relevant evidence necessary to establish a

valid defense.'" *Kelly*, 888 F.2d at 743. The CAAF's decision permits the trier of fact to make the determination of an accused deserter's intent from little more than the act of being absent itself.

The CAAF relied on *United States* v. *Kabat*, 797 F.2d 580 (8th Cir. 1986), *cert. denied*, 481 U.S. 1030 (1987), which, however, has very little bearing on Captain Huet-Vaughn's case. (30a.) *Kabat* did not address the question whether a defendant's evidence should or should not be admitted. Rather, the defendants in *Kabat* challenged the sufficiency of the government's evidence on the issue of intent, after they, unlike Captain Huet-Vaughn, had been permitted to introduce their own evidence on the issue. In addition, *Kabat* discusses the specific intent required under an entirely different statutory provision than that involved in this case, which requires the intent to "injure, interfere with, or obstruct the national defense." 18 U.S.C. § 2155. The defendants in *Kabat* admitted that they acted with the intent to disarm nuclear weapons; thus, unlike Captain Huet-Vaughn, they admitted having the intent required by the statute.[5/]

Captain Huet-Vaughn was thus not similarly situated to the defendants in *Kabat*; her situation is far more analogous to the defendant in *Morissette*. While Captain Huet-Vaughn

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[5/] Although the defendants in *Kabat* did attempt to argue that they lacked the requisite intent--on the ground that they believed that disarming the weapons would assist the national defense in some generalized way--the court held that "national defense" under the statute meant the government's chosen "activities of national preparedness" and not some more subjective idea of the country's well being. Consequently, the defendants' admitted specific intent to disarm weapons fell within the definition of an intent to interfere with the national defense and the defendants therefore had plainly and simply admitted that they acted with culpable specific intent. In contrast, Captain Huet-Vaughn has always maintained that she did not act with the culpable specific intent to shirk hazardous or important duty.

admitted her absence from her unit, she did *not* concede that she specifically intended to avoid hazardous duty and shirk important service and then merely seek to explain why. Here, as in *Morissette*, while Captain Huet-Vaughn's conduct (quitting her unit) might be probative on the issue of intent, it was certainly not dispositive; rather, it could have been rebutted through, *inter alia*, the introduction of motive evidence. This is precisely the holding of *Morissette*. There, the district court believed the fact that the defendant was found with the spent bomb casings in his truck was dispositive on the question of criminal intent. This Court categorically stated that such an assumption was incorrect:

> That the removal of them was a conscious and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent to steal or knowingly convert, that is, *wrongfully* to deprive another of possession of property.

342 U.S. at 276 (emphasis in original).

C. The CAAF's decision is a dramatic departure from prior military jurisprudence.

The military judge's inexplicable limitations on evidence about Captain Huet-Vaughn's intent when she left her unit was also an anomaly in military law. By approving that ruling, however, the CAAF has now encouraged all military courts to exclude evidence of this element of a desertion charge in a manner inconsistent with this and other federal courts' jurisprudence. As the ACMR noted in its opinion, citing sixteen cases spanning forty-two years, historically an individual accused of desertion has been allowed to present evidence to explain that his or her intent was "other than to remain away

permanently, or to avoid hazardous duty, or to shirk important service."[6/] (52a.)

This is because an individual who *intentionally* leaves a unit engaged in hazardous duty or important service, but does so without the specific intent to avoid the hazardous duty or important service, may have committed the offense of being absent without leave ("AWOL"), but has not deserted. AWOL is a lesser included defense of desertion, M.C.M. Part IV, § 9d, with desertion's specific intent requirement distinguishing between the two charges. *See, e.g., United States* v. *Apple*, 2 U.S.C.M.A. 592, 594, 10 C.M.R. 90, 91 (1953); *United States* v. *Williams*, 10 C.M.R. 219, 221 (A.B.R. 1953).

"*As a matter of law*, the offense of desertion is not committed by reason of a naked unauthorized absence, without more, from a unit engaged in hazardous duty." *United States* v. *Apple*, 2 U.S.C.M.A. 592, 593, 10 C.M.R. 90, 91 (1953) (emphasis in original). Thus, as the ACMR correctly noted, citing *United States* v. *Guthrie*, 12 C.M.R. 299, 302 (A.B.R. 1953), intent in a desertion case does not necessarily exist merely because an absence is proven. (49a.) Rather, "proof is permissible to show that a different intent existed." *Guthrie*, 12 C.M.R. at 302 (citations omitted).

Furthermore, courts of military review have consistently held that when an accused has introduced evidence of a contrary intent which is believed by the fact finder, a desertion conviction will not stand. *See, e.g., Apple*, 2 U.S.C.M.A. 592, 10 C.M.R. 90 (if trier of fact believed that accused left to clear up confusion regarding rotation obligation, accused did not have requisite intent to desert); *United States* v. *McIntyre*, 2 U.S.C.M.A. 559, 10 C.M.R. 57 (1953) (accused permitted to

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[6/] As the ACMR also noted, in some of the cases cited in its opinion, the accused's testimony and evidence on intent did not persuade the trier of fact; the important point about the cases, however, is that the accused was permitted to testify and to present all relevant evidence concerning his or her intent. (52a.)

testify that he left his unit because the army food made him sick; if believed, he had no intent to desert).

In *United States* v. *Shull*, 1 U.S.C.M.A. 177, 2 C.M.R. 83 (1952), the court held the government's evidence of intent insufficient for a desertion conviction and emphasized the proof problems inherent in such cases:

> [T]he actual physical, temporal, or administrative proximity of the accused to the service in question is not important in this type of case in any ultimate sense--that is as a matter of law. These elements only function as items of circumstantial evidence raising inferences of intent of varying degrees of compulsion. It is conceivable, at least, that an absence without leave from a port of embarkation might not have been effected with a subjective intent to avoid overseas duty.

Id. at 171, 2 C.M.R. at 87.[2/] Hence, the right of one accused of

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[2/] The CAAF relied upon dicta in *Shull* suggesting that the specific intent required for a desertion conviction *may* be proven if the defendant had reasonable cause to know that he would avoid important service by his actions (33a), but this language was superfluous to the decision in that case. 1 U.S.C.M.A. at 182-83, 2 C.M.R. at 88-89. *Shull* does not stand for the proposition that specific intent is *ipso facto* proven once a defendant had reasonable cause to know that his actions would cause him to avoid hazardous duty. The defendant in *Shull* did not rely on any evidence that he acted with an entirely different intent than to avoid hazardous duty as Captain Huet-Vaughn tried to do; rather he simply argued that the government had not presented sufficient evidence of his intent to avoid hazardous duty. Thus, *Shull*'s dicta is not pertinent to this case, where Captain Huet-Vaughn was deprived of her right to present evidence to rebut the government's showing concerning her intent and where, on the basis of the excluded evidence, the trier of fact might have concluded that Captain Huet-Vaughn did not in fact intend to avoid

desertion to explain his or her subjective intent is critical.[8/]

In *Apple*, the accused testified that he left a unit engaged in hazardous duty in Korea not to avoid the duty but rather to go to the rear to "see what had occasioned the evident confusion in his records with respect to rotation points." 2 U.S.C.M.A. at 593, 10 C.M.R. at 91. On appeal from his conviction of desertion, the court ruled that

> [i]f the accused's story on the stand was true, he did not desert his unit *with intent to avoid hazardous duty*. Although he may in fact have avoided it, his object instead was to secure clarification of his confused rotation point situation.

Id. at 593-94, 10 C.M.R. at 91-92 (emphasis in original). The accused's veracity was for the fact finder to determine. *Id.* In reversing the conviction, the court stated that

> [e]ven though the evidence militating against the presence of a purpose to avoid hazardous duty came only from the lips of the accused himself, it was nonetheless fully competent to place the question of his intent squarely in issue. . . . [T]here was thus brought to the fore, as a reasonable alternative to the offense charged, the lesser included offense of absence without leave.

Id. at 594, 10 C.M.R. at 92 (citations omitted). Captain Huet-Vaughn's own testimony alone, then, could have sufficed to

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hazardous duty or shirk important service.

[8/] Indeed, it is in the *absence* of direct testimony as to the accused's intent that intent may be inferred from circumstantial evidence. *United States* v. *Taylor*, 2 U.S.C.M.A. 389, 392, 9 C.M.R. 19, 22 (1953).

show that she did not act with intent to avoid hazardous duty but rather that her "object instead" was to educate the public and to voice her concerns about the legality of the war in the Gulf. Unlike the accused in *Apple*, however, Captain Huet-Vaughn was not given the chance to explain why she went AWOL.

In *United States* v. *McIntyre*, 2 U.S.C.M.A. 559, 561, 10 C.M.R. 57, 59 (1953), the accused testified that he had left his unit in Korea because "army food made him sick and he left the forward area for that reason." The court ruled that "if the court members believed that the accused, in good faith, left his place of duty for physical reasons, there could be no finding that he absented himself without authority or that he intended to avoid hazardous duty." *Id.*[9/]

The CAAF's citation of *McIntyre* illustrates that court's error. Noting that *McIntyre* upheld a refusal to instruct that it was a defense if the accused "in good faith felt he was unable to perform his duty," *id.*, the CAAF stated wrongly that the case rested on a view that "such a defense was not raised by the evidence" and extrapolated that Captain Huet-Vaughn's "excuse for leaving her unit" similarly did not raise a defense. (35a.) In fact, the *McIntyre* decision rested on the ground that the trier of fact had necessarily decided the issue of good faith when it determined whether or not the accused "intended to avoid hazardous duty." 2 U.S.C.M.A. at 561, 10 C.M.R. at 59.[10/] Thus, in *McIntyre*, unlike the present case, the jury heard the accused's testimony as to his reasons for leaving his unit, and then determined whether or not he intended to avoid hazardous

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[9/] Because the court members obviously had not believed the accused's defense, the court upheld his conviction; nevertheless the accused was properly allowed to testify that he had an intent other than to shirk hazardous duty, and the question of the persuasiveness of his testimony was left to the jury to decide.

[10/] The court also based its opinion on the fact that the defendant at trial had not requested the instruction at issue. 2 U.S.C.M.A. at 561, 10 C.M.R. at 59.

duty. *See also United States* v. *Shepard*, 1 U.S.C.M.A. 487, 491, 4 C.M.R. 79, 82-83 (1952) (defendant could have "departed from his unit for the purpose of accumulating money by criminal means and not because he intended to avoid hazardous duty").

The facts of this case are analogous to those of *United States* v. *Cline*, 2 U.S.C.M.A. 411, 413, 9 C.M.R. 41, 43 (1953), in which the accused, having left his combat area in Korea, admitted being AWOL, but challenged the element of intent to avoid hazardous duty or important service:

> While the accused tacitly admitted the commission of the offense of absence without proper authority, a clear and distinct line of cleavage developed between the prosecution and defense case at this point. The testimony of the accused raised the issue of whether he had ever formed an intention to desert. Certainly it is possible, and probably reasonable to conclude from his testimony that the accused was motivated by combat fatigue and a genuine misunderstanding of [his commanding officer's] angry utterances.

The desertion conviction therefore could not stand. *Id.*

Captain Huet-Vaughn was explicitly barred by the military judge's order from testifying as to what specific intent she formed when she left her unit. Consequently, the members were prevented from hearing her reasons and judging her veracity. Moreover, the CAAF's decision allows future members of courts martial similarly to be kept in the dark about the intention of an individual accused of desertion. The CAAF's decision in this case is obviously incorrect; if it were not, then *Apple*, *McIntyre*, *Shepard*, and the many other cases cited by the ACMR would have been incorrectly decided. The CAAF now holds that a service member who leaves the service

in the midst of hazardous duty (i.e. while knowing that she is engaged in hazardous duty), or who leaves the service knowing that hazardous duty is imminent, necessarily intends to avoid that duty (except, perhaps, in an extreme case if the member was insensate or physically helpless when she missed the duty in question). Thus, under military law as now dictated by the CAAF, a criminal defendant may not testify in her defense on an actual element of a crime charged. It is not, however, a judge's province to decide whether a defendant's evidence may successfully rebut the government's evidence on an element of the crime; criminal defendants must be permitted to testify even if a court does not believe the testimony, because credibility is an issue for the jury to decide. While it may be that, once having *admitted* possessing the requisite intent for criminal liability, a defendant may be prevented from explaining that intent further, it is not the case that a defendant may be precluded as an initial matter from testifying that she does not have the requisite specific intent.

Not only should Captain Huet-Vaughn have been allowed to testify fully as to her intention to warn against and to avert an impending human and environmental disaster, including what she believed would be violations of international law (rather than to avoid hazardous duty), but she should also have been permitted to present evidence to support her contention that she believed international law and Nuremberg principles prohibited her from participating in violations both of international law and of her physician's oath. *Cf. United States* v. *Kelly*, 888 F.2d 732 (11th Cir. 1989). Her defense that she did not act with the intent to avoid hazardous duty was not based on the *actual* legality or illegality of the United States' actions in Southwest Asia. Rather, if Captain Huet-Vaughn herself *believed* that the United States' actions were going to be illegal, the jury could have found that she acted with the intent to comply with an affirmative obligation to withdraw her consent from the Gulf War, rather than with the intent to avoid hazardous duty.

The CAAF's decision conflates two separate elements of a desertion charge--that the accused intended to avoid hazardous duty or important service *and* that the accused knew that she would be required for such duty or service--by holding, in effect, that once the government has shown the latter, the former may simply be presumed. The CAAF, however, is incorrect in its assumption that any individual who leaves his or her unit with knowledge that the unit is or may become involved in hazardous duty is *ipso facto* guilty of desertion, and may not present evidence that he or she did not intend to avoid such duty. If this were the law, the accused in *Apple* would not have been permitted to testify that he left his unit to clear up confusion in his records and the accused in *McIntyre* would not have been allowed to testify that he left his unit because army food made him sick. Military law is patently to the contrary -- the government is required by statute to prove that an individual accused of desertion left her his or unit with the intent to avoid hazardous duty or important service -- and military cases were decided accordingly prior to the CAAF's decision in this case.

The CAAF cited an inapplicable provision explaining the elements of Article 90 of the Uniform Code of Military Justice, which proscribes willfully disobeying a superior commissioned officer, an offense with which Captain Huet-Vaughn was *not* charged. (31a.) Language quoted by the CAAF to the effect that "the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order" comes from an explanation of Article 90's requirement that the order disobeyed have been lawful. M.C.M. Part IV, § 14c(2)(a)(iii). (5-6a.) The intent element of an Article 90 offense--willfulness--is described separately. *See* M.C.M. Part IV, § 14c(2)(f). (6a.)

No similar language is set forth in the manual's explanation of the elements of the offense of desertion under Article 85 of the U.C.M.J., *see* M.C.M. Part IV, § 9c(1)(d)(2), despite the fact that the manual sets forth other specific defenses which cannot be used to defeat an Article 85 offense. *See, e.g.*,

M.C.M. Part IV, §§ 9c(1)(a), (c)(ii). (3a-4a.) Had the drafters of the manual so intended, they could have prohibited under Article 85 the same defense as is prohibited under Article 90. That they did not do so is significant.[11/]

There was thus simply no precedent in military law to support the military judge's ruling or the CAAF's approval of that ruling; rather, established case law mandated that the CAAF reach the opposite result. The court's error should be corrected before its precedential effect as the holding of the highest military court permeates the military justice system.

D. The CAAF's decision distinguishes between evidence of intent and evidence of motivation behind the intent in a manner that wrongly presupposes intent has been proven.

In ruling and instructing the court members that "to consciously, intentionally quit one's unit to avoid hazardous duty and/or important service because of one's conscience, religion, or personal philosophies is not a defense and testimony on the merits relating to such contentions is therefore irrelevant" (87a, 120a), the military judge presupposed that Captain Huet-Vaughn's intent to avoid hazardous duty had already been proven beyond a reasonable doubt. It has, however, always been Captain Huet-Vaughn's contention that she never in fact had the specific intent to avoid hazardous duty or important service, and that she should have been permitted to present evidence to that effect. The military judge's ruling, approved by the CAAF, thus placed the cart before the horse. If the government succeeded in establishing the requisite intent, it did

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11/ *Cf. I.N.S.* v. *Cardozo-Fonseca*, 480 U.S. 421, 432 (1987) ("[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion").

so only because Captain Huet-Vaughn was not permitted to rebut the government's showing with her own evidence that she did not act with the specified intent. Only if she had done so, however, could the trier of fact properly have determined whether it believed her or not, and then reached the ultimate determination whether the government had proven that Captain Huet-Vaughn acted with the requisite intent.

The CAAF attempted to distinguish between evidence of intent and evidence of subjective "motivations" of an accused (29-30a), stating that evidence of motive is irrelevant once intent has already been established, and holding that Captain Huet-Vaughn's excluded testimony and evidence would have constituted irrelevant motive evidence. The CAAF's distinction is false. The issue is whether Captain Huet-Vaughn was wrongly curtailed in her attempts to disprove the government's allegations about her intent; the question is not whether, *after* her intent was admitted, she should *then* have been permitted to testify as to the additional motivation underlying her intent.[12/]

In *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), this Court held unconstitutional a jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts," *id.* at 513, specifically because the jury was not properly instructed that any such presumption could be rebutted by the defendant's evidence, *id.* at 519, 524. In the present case, Captain Huet-Vaughn was in effect precluded from rebutting the "presumption" that she intended to avoid hazardous duty simply because she left her unit when the unit was likely to become engaged in hazardous duty. The military judge's rulings and instructions not only suggested the existence of a presumption that any individual who leaves his or her unit with

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12/ The military judge ensured that the jury would not be aware of his conflation of the separate issues of intent and the explanation for that intent when he refused to charge the members of the court that there could be no conviction if Captain Huet-Vaughn did not intend to avoid hazardous duty or to shirk important service. (120-21a.)

the knowledge that she might be required for hazardous duty does so with the intent to avoid hazardous duty, but by ruling that Captain Huet-Vaughn should not have been permitted to testify herself or submit supporting evidence to show that she did not have this intent, the CAAF's decision permits military courts to apply the impermissible conclusive and irrebuttable presumption at issue in *Sandstrom*. This Court has held, however, that "a conclusive presumption on the issue of intent is the functional equivalent of a directed verdict on that issue." *Id.* at 84. *Cf. United States* v. *Huff*, 7 U.S.C.M.A. 247, 250, 22 C.M.R. 37, 40 (1956) (with respect to a desertion charge based on the specific intent to remain away permanently, "to preclude the accused from contesting the question of his intent to desert because he admits [reenlisment in another branch of the armed forces], is tantamount to creating a conclusive presumption of an intention to remain away permanently from the fact of reenlistment. Such a presumption is illegal"). A directed verdict is unquestionably improper in a criminal prosecution. *Connecticut* v. *Johnson*, 460 U.S. 73, 84 (1983)

2. The Restrictions Placed In This Case Upon The Accused's Ability To Present Evidence Of Her Intent Were Not Harmless.

The dissenting judge of the CAAF, while holding it error for the military judge to have excluded Captain Huet-Vaughn's testimony and other evidence concerning her intent, believed that "CPT Huet-Vaughn was not prevented from explaining her reasons for leaving her unit to the members" and that the error was therefore harmless. (37a.) It is not possible, however, to determine after the fact so definitively (if at all) what effect Captain Huet-Vaughn's full testimony, coupled with the supporting evidence of other witnesses, would have had on the jury. Nearly every time Captain Huet-Vaughn attempted to testify concerning her intent when she left her unit, the government's objection was sustained and, as the ACMR found,

Captain Huet-Vaughn was at most permitted to present only a "sketchy summary" of her intent. (47a.)

The CAAF judge's suggestion that the military judge's evidentiary rulings were harmless error because Captain Huet-Vaughn somehow managed to present her defense through her own drastically curtailed testimony is an absurd assertion in itself; Captain Huet-Vaughn was simply not allowed to testify fully as to what was in her mind when she left her unit.[13/] This suggestion is even weaker in light of the military judge's instruction to the jury that it could not consider evidence of

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[13/] Relying on instances where Captain Huet-Vaughn managed to testify briefly as to her intent despite the military judge's rulings *in limine* and the prosection's objections, the CAAF stated that "[c]onsiderable evidence was admitted regarding CPT Huet-Vaughn's moral, ethical, philosophical, and legal objections to the Persian Gulf war." (28a.)

Captain Huet-Vaughn's testimony, however, must be taken in the context of the numerous prosecution objections whenever she attempted to explain her intent, and the fact that defense counsel could not base his opening or closing statements on what Captain Huet-Vaughn's specific intent actually was at the time of the alleged offense. Indeed, the only statement defense counsel was able to make about Captain Huet-Vaughn's intent was a negative -- that she did not have culpable intent but not what intent she did have -- in his opening statement: "[W]e maintain to you that we will prove to you, if permitted to do so, that this lady's specific intent in refusing to go to the Persian Gulf was not for the purpose of avoiding hazardous duty or shirking important service." (92a.) In response, the military judge told the court members that he would "comment briefly on the opening statement" and instructed them that, "[t]o consciously, intentionally quit one's unit to avoid hazardous duty and/or important service because of one's . . . conscience, religion or personal philosphies is not a defense." (93a.) As the ACMR held, Captain Huet-Vaughn was at most able to adumbrate a sketchy picture of her intent. The military judge then compounded the error by instructing the court members to disregard the meager evidence that Captain Huet-Vaughn managed to introduce regarding her intent. *See Morissette* v. *United States*, 342 U.S. 246, 249, 263, 274 (1952) (it was error to "refuse[] to submit to or allow counsel to argue to the jury whether [the defendant] acted with innocent intention").

Captain Huet-Vaughn's "conscience, religion, personal philosophy, [or] ethical or professional considerations."[14/] (120a.) Because Captain Huet-Vaughn's limited explanation of her intent centered on matters of her conscience, her religious beliefs, her professional and ethical codes and her personal philosophy, it must have been clear to the court members that this instruction meant they were to disregard whatever scant testimony Captain Huet-Vaughn was able to give concerning her intent. Thus, the fact that she might have managed, over objection, very briefly to articulate her opposition to the war in the Gulf in general (although she was never allowed to testify as to her intent at the time she left her unit) is not relevant here; any such evidence was rendered ineffective by the judge's instructions. Indeed, the CAAF itself held that, "in effect, the members were told to disregard" any evidence concerning Captain Huet-Vaughn's beliefs or philosophy when deliberating the merits of the case. (33a.)

Thus, the military judge not only excluded the most relevant evidence of Captain Huet-Vaughn's specific intent at the time of the alleged crime--her testimony--but compounded the error by instructing the jury not to consider any evidence of her intent other than that presented by the prosecution.

Finally, even if the government was correct that significant evidence of Captain Huet-Vaughn's defense was presented despite the military judge's rulings, which Captain Huet-Vaughn disputes, the error would not be harmless. Where, as here, the only contested issue in a case is intent, and excluded evidence relates to that "determinative issue," any duplicative aspect of evidence is not needless and exclusion of the evidence cannot be held harmless. *United States* v. *Gaskell*, 985 F.2d 1056, 1063 (11th Cir. 1993). *See also United States* v. *Biaggi*, 909 F.2d 662, 692 (2d Cir. 1990) ("[w]here evidence of a defendant's state of mind, critical to a fair adjudication of

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14/ The ACMR noted that this instruction deviated from the standard instruction. (48a.)

criminal charges, is excluded, we have not hesitated to order a new trial"), *cert. denied*, 499 U.S. 904 (1991).

In *Connecticut* v. *Johnson*, 460 U.S. 73, 85-86, this Court held that an erroneous instruction suggesting a presumption of intent to a jury was not harmless error, because "[i]f the jury may have failed to consider evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict." In Captain Huet-Vaughn's case, because the military judge not only instructed the trier of fact to disregard evidence of Captain Huet-Vaughn's intent, but refused to allow Captain Huet-Vaughn even to present her evidence on the question of intent, the court members' failure "to consider evidence of intent" was ensured. This error, which has serious implications for future desertion defendants, cannot therefore be harmless.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Constitutional and Statutory Provisions

The Fifth Amendment to the United States Constitution provides, in relevant part, that:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

The Sixth Amendment to the United States Constitution provides, in relevant part, that:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, ...

Article 85 of the Uniform Code of Military Justice ("U.C.M.J."), 10 U.S.C. § 885, Manual for Courts Martial ("M.C.M."), Part IV, § 9 (1984, as amended 15 November, 1990), provides in relevant part:

> **9. Article 85--Desertion**
>
> a. *Text*
>
> "(a) Any member of the armed forces who--
>
> (1) without authority goes or remains absent from his unit, organization, or

> place of duty with intent to remain away therefrom permanently; [or]
>
> (2) quits his unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service; . . .

is guilty of desertion.

* * *

(c) Any person found guilty of desertion or attempt to desert shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the desertion or attempt to desert occurs at any other time, by such punishment, other than death, as a court-martial may direct."

* * *

b. *Elements.*

* * *

(2) *Desertion with intent to avoid hazardous duty or to shirk important service.*

> (a) That the accused quit his or her unit, organization or other place of duty;

(b) That the accused did so with the intent to avoid a certain duty or shirk a certain service;

(c) That the duty to be performed was hazardous or the service important;

(d) That the accused knew that he or she would be required for such duty or service; and

(e) That the accused remained absent until the date alleged.

* * *

c. *Explanation.*

(1) *Desertion with intent to remain away permanently.*

(a) *In general.* . . . A prompt repentance and return, while material in extenuation, is no defense. . . .

* * *

(c) *Intent to remain away permanently.*

> (ii) . . . . [I]t is no defense that the accused also intended to report for duty elsewhere, or to enlist or accept an appointment in the same or a different armed force.
>
> * * *
>
> e. *Maximum punishment.*
>
> (1) *Completed or attempted desertion with intent to avoid hazardous duty or to shirk important service.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.
>
> * * *
>
> *(3) In time of war.* Death or such other punishment as a court-martial may direct.

The Manual for Courts Martial, Part IV, § 14 (1984, as amended 15 November, 1990) provides in part:

14. Article 90--Assaulting or willfully disobeying superior commissioned officer

a. *Text.*

"Any person subject to this chapter who--

* * *

(2) willfully disobeys a lawful command of his superior commissioned officer;

shall be punished . . . ."

* * *

c. *Explanation.*

* * *

(2) *Disobeying superior commissioned officer.*

(a) *Lawfulness of the order.*

* * *

(iii) *Relationship to military duty.* . . . However, the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the

disobedience of an otherwise lawful order. . . .

* * *

(f) *Nature of the disobedience.* "Willful disobedience" is an intentional defiance of authority. Failure to comply with an order through heedlessness, remissness, or forgetfulness is not a violation of this article . . . .

APPENDIX B

United States, Appeliant

v.

Yolanda M. HUET-VAUGHN, Captain
U.S. Army, Appellee

No. 94-5005

CMR No. 9101873

United States Court of Appeals for the Armed Forces

Argued April 4, 1995

Decided September 28, 1995

Counsel

For the Accused: Hillary Richard (argued); Caroline Rule (on brief).

For the United States: Colonel John M. Smith (argued); Colonel Dayton M. Cramer, Lieutenant Colonel James L. Pohl, Captain Gregory T. Baldwin (on brief); Major Lyle D. Jentzer.

Military Judge: Richard D. Russel

Opinion of the Court

GIERKE, Judge:

1. A general court-marital composed of officer members convicted Captain (CPT) Huet-Vaughn, contrary to her pleas, of desertion with intent to avoid hazardous duty and shirk important service, in violation of Article 85, Uniform Code of Military Justice, 10 USC § 885. The court-martial sentenced her to dismissal from the service, confinement for 30 months, and total forfeitures. The convening authority reduced the confinement to 15 months. The Deputy Assistant Secretary of the Army for Department of the Army Review Boards and Employment Opportunity Compliance and Complaints Review remitted 7 months of confinement and ordered Captain Huet-Vaughn released from confinement after she had been confined for 240 days.

2. The Court of Military Review */ set aside the findings of guilty and the sentence on the ground that the military judge had improperly restricted CPT Huet-Vaughn from presenting evidence of motive. 39 MJ 545 (1994). The Judge Advocate General of the Army then certified the following issue for our review:

FOOTNOTE:

/ See 41 MJ 213, 229 n. (1994).

WHETHER THE MILITARY JUDGE'S GRANTING OF THE GOVERNMENT'S MOTION IN LIMINE, RESTRICTING [CPT HUET-VAUGHN] FROM TESTIFYING AND PRESENTING OTHER EVIDENCE OF MOTIVE TO CONTEST THE ELEMENT OF SPECIFIC INTENT, WAS PREJUDICIAL ERROR.

We answer the certified question in the negative.

Factual Background

3. The prosecution filed two motions in limine. The first asked the military judge.

> to exclude any documentary or testimonial evidence of any sort during the case on the merits concerning the accused's alleged status as a conscientious objector; the dictates of her conscience, religion, or personal philosophy; her patterns of belief concerning the Persian Gulf conflict and war generally; and her world views . . . .

4. The prosecution argued that such evidence was irrelevant and that, even if relevant, it "would confuse the issues, mislead the members, or be a waste of time."

5. The second motion in limine asked the military judge

> to exclude any documentary or testimonial evidence of any sort during the case on the merits, or during sentencing should the case reach that stage, concerning the legality of the conflict in the Persian

> Gulf or the legality of Presidential authority to order members of the armed forces to Southwest Asia. . . .

6. The Government argued that the court-martial "is not the appropriate forum to litigate the legality of the conflict in the Persian Gulf or the legality of Presidential authority [.]" The Government characterized such issues as "political questions outside the realm of judicial scrutiny." Alternatively, the Government argued that "the legality of the Persian Gulf conflict is irrelevant as a defense to the charge of desertion."

7. After extensive argument and offers of proof, the military judge opined as follows:

> If the reason for going AWOL [absent without leave] or quitting the unit, as is used in this specification, was to avoid this duty, then it makes no difference what her reason for intending to avoid this duty was, except in extenuation and mitigation.

8. After further argument, the military judge ruled:

> Well, it's an interlocutory question, it'll be raised before me. But at this point the motion is denied. I'll allow Captain Huet-Vaughn, subject to objection, to tell what her--what her intentions were, if you feel that that's appropriate at any given time. But I'm saying that--I guess what I'm doing here--and what a motion in limine is is basically a declaratory as to what--how my rulings will run with regard to how far I'll let her testify as to what her views of the world were. Okay. All of that in extenuation and mitigation, obviously, is--is open . . . .

9. The discussion continued, and defense counsel asserted that CPT Huet-Vaughn's "intent was not to avoid hazardous duty or important service, but her intent was to expose what she felt were impending war crimes in the Persian Gulf and to expose that to the American people, to the Congress, to the United Nations, talk shows, et cetera, et cetera. That was her intent; that was the reason why this lady actually went AWOL."

10. During voir dire of the court members, defense counsel asked a potential member what his opinion was about conscientious objectors. The military judge interrupted and advised the members that "as a matter of law, one who consciously and intentionally quits one's unit to avoid hazardous duty and/or important duty because of one's conscious--conscience, religion, or personal philosophies, that is not a defense." He further instructed that "a person who consciously and intentionally quits one's unit to avoid hazardous duty and/or important service because of one's belief that she may be asked to become a principal in an illegal act, i.e., a war crime, is speculative and is not a defense."

11. Defense counsel also asked a member whether he understood that other officers and enlisted soldiers could differ with him on a matter of conscience. The military judge interrupted, instructed the member not to answer, and stated, "I've already instructed them that matters as to conscience are not to be considered on the merits."

12. During the opening statements, defense counsel told the members:

> Her specific intent on leaving was not to avoid hazardous duty . . . . This was a lady of conscience;

> that was not her specific intent. Now, just what her specific intent was, I've been restricted from making statements as to what that specific intent was. I cannot tell you. But, in any event, she will testify and she will be asked to explain what her specific intent was. And if that objection is sustained, if there is an objection on that question and if it is sustained, you will not hear from her what her specific intent was. In other words, we might not well be permitted to introduce our evidence from our side as to the circumstances of what her specific intent was.

13. After opening statements, the military judge instructed the members as follows, over defense objection:

> I'll comment briefly on the opening statement, because the references kind of leave you dangling as to what it is that I've ruled and--and what it is that you will or will not be able to consider, depending on what the objections are by counsel. The element in question that's been referred to by Mr. West on various occasions is that the accused did so--that is, to--the first element is that she quit her unit. The second element is the one that's--that's in--that he's been talking about all along. And the element is that the accused did so with intent to avoid hazardous duty and/or to shirk important service; namely, deployment to Southwest Asia in support of Operation Desert Shield. At issue is whether the accused consciously, intentionally quit her unit so she would not have to perform these duties. To consciously, intentionally quit one's unit to avoid hazardous duty and/or important service because of one's conscious--excuse me--conscience, religion, or personal philosophies is

not a defense. It may be a motive, but it is not a defense . . . .

14. CPT Huet-Vaughn testified in her own defense. She described her background, her family, and her upbringing, as well as her political activism beginning with antiwar demonstrations in high school. She described her medical education and experience, and her work with organizations devoted to bringing health care to inner-city areas and rural areas. While in medical school, she joined the Tennessee National Guard as a second lieutenant in the Medical Service Corps. She regarded it as an opportunity to provide community service. She also participated in anti-apartheid activities and women's issues as a civilian.

15. After graduating from medical school, she began a residency in social medicine and family practice in the Bronx, New York City. She transferred to a National Guard unit in the Bronx. She became interested in the health effects of nuclear weapons and worked with a national organization known as Physicians for Social Responsibility (PSR). After naming two prominent members of PSR, defense counsel asked CPT Huet-Vaughn, "I believe you called both those witnesses in your case, is that right?" Trial counsel objected to the reference to witnesses who had been ruled irrelevant. The military judge sustained the objection and admonished defense counsel not to refer to proceedings conducted outside the hearing of the members.

16. CPT Huet-Vaughn testified that when she moved back to Kansas City, Missouri, she transferred to the 325th General Hospital, an Army Reserve unit. After completing her residency, she resigned her reserve commission in August 1982 and entered the Public Health Service as a commissioned officer. In November 1983 she

resigned her Public Health Service commission and entered the "private practice option in the Public Health Service," working as a private family doctor in underprivileged areas.

17. In June of 1990, CPT Huet-Vaughn again joined the Army Reserve. When she rejoined the Army Reserve, she was aware of United States activity in Panama and Grenada, and the bombing of Tripoli. She testified that she thought the invasion of Panama was illegal and that the bombing of Khadafy's household in Tripoli was "a violation of international law."

18. Defense counsel asked CPT Huet-Vaughn why she rejoined the Army Reserve. She responded that she was motivated by her desire to pay back the 7-year commitment she had made in medical school, by her desire for public service, and to gain credibility in her political activism.

19. As hostilities escalated in the Persian Gulf, CPT Huet-Vaughn actively spoke out, along with several other PSR members who also were members of her reserve unit. She testified that she and her PSR colleagues "were very concerned . . . [b]ecause in the early fall we deployed more than 350 nuclear weapons to the Gulf. And those are weapons of mass destruction. Those are weapons outlawed by international convention." Trial counsel objected, and the military judge ruled that he would "let her comment briefly." She continued testifying that she was concerned because "[e]ven if they weren't used, something could happen and it would be a tragedy and--and a disaster if they were used."

20. On December 23, 1990, CPT Huet-Vaughn was ordered to active duty. Although she complied with her orders, she testified:

> I was having reservations at this time, very strong reservations, about providing any support to Operation Desert Shield, whether it be in the Persian Gulf, whether it be in Europe, or whether it be stateside.

21. Defense counsel then asked CPT Huet-Vaughn to tell the court-marital "how you came to that--that reservation and when, if that reservation was a mounting thing?" Trial counsel objected, and the military judge told defense counsel:

> Well, if what you're trying to get from her is what her-her moral approach was to this, her religious approach, and her personal philosophies with regard to what was going on, I've already explained to the court and--and to you that those are in no way a defense to this, and therefore they're not relevant.

Defense counsel explained that he was offering CPT Huet-Vaughn's testimony "as a chronology of events to show how this lady became concerned to the point where she wouldn't go." The military judge responded, "Just ask her if she began to have moral reservations." Defense counsel complied, and CPT Huet-Vaughn testified:

> Well, I began to be--I guess, moral reservations, as--as you put it, and also reservations regarding medical --my role as a physician and my--and the ethics of what I was doing as a physician. I learned a great deal in that last month from a number of--of other, what I consider very learned, groups, like the International Physicians for the Prevention of Nuclear War, like Physicians for Social Responsibility, about the projected civilian casualties that--

Trial counsel's objection at that point was sustained. CPT Huet-Vaughn continued, "I learned a great deal about an environmental disaster that was----." Trial counsel's objection again was sustained. When the military judge observed that CPT Huet-Vaughn was talking about things that "affected her personal philosophy," defense counsel responded that they "affected her decisions," and CPT Huet-Vaughn interjected, "And which affected my intent."

22. Permitted by the military judge to continue, CPT Huet-Vaughn testified:

> And I put the data that I had gathered together, still doubting, I guess--still hoping, I guess, would be the word, or not believing that the information I had gathered that had--that if--if the administration knew the information that I had gathered, which I was hoping they did, that they would not be willing to--to gamble all of the catastrophic consequences that I saw occurring if--if we proceeded to war. When then things mounted and--basically I learned that, while I was at Fort Leonard Wood, that we had mobilized the civilian blood supply, I--

Trial counsel again objected. The military judge advised defense counsel that he could ask a general question so that she could describe "some moral conclusions, some philosophical conclusions, some ethical conclusions" and that she acted on those conclusions. CPT Huet-Vaughn, still on the witness stand, asked, "[C]an I talk about medical ethics?" The military judge responded, "[N]ot in specifics." She continued:

> Okay. Well, then, I'll be--I came--with the data that I gathered with the concerns that I had that were

> ethical, moral, also based on--on my--the oath that I had taken as a physician and also the oath that I had taken as--as a military person, I felt that something more was required of me than to just proceed without--without attempting to--without attempt to--to expose what I saw at that point as--as a move to a catastrophic consequence.

Trial counsel's objection at that point was overruled. CPT Huet-Vaughn continued:

> You can--there's sins of omission and sins of commission, so to speak. You can do something that's wrong, or you can refuse to do something that's right. And what I saw my choice at that point was that if I--if I went along with--with the orders that I was given, I would in fact be choosing to not do something that--to committing a sin of omission, so to speak. Having all the data that I gathered, having the perspective that I had, and ignoring it, would have been immoral and would have been something that I could not do.

The prosecution again objected, but the military judge ruled, "I'm going to let her proceed." She continued:

> And so I, at that point, made a decision that I would have to withdraw my consent from what--from what was happening and--and so--so I did in an effort to--to try to--to educate and to hopefully mobilize again the community to do something about this in Washington and at the United Nations, so that this wouldn't happen.

23. CPT Huet-Vaughn testified that she "consider[ed] the Nuremberg Principles from my course at Fort Sam Houston" in arriving at her decision. She also consulted with several religious, political, and medical authorities. After she described her various consultations, defense counsel asked her, "When did you make up your mind about not going to the Persian Gulf?" She responded, "I made up my mind not to support Desert Shield----," but she was interrupted by the prosecutor's objection. The military judge allowed her to continue, and she responded:

> On the evening of--let's see, it must have been December--it was Friday. We--we--let's see, December the 20--December the 28th, I think, was a Friday, and I made my decision at that time, that I would--would not support Desert Shield, either in the Persian Gulf, in the States, or in--in--anywhere else.

24. Defense counsel then questioned CPT Huet-Vaughn about her intent:

> Q. Now I want to ask you this question very carefully. What was your intent at the time you went AWOL?
>
> A. My intent at that time was--was to expose the nature of what I knew---
>
> TC: Objection, you honor.
>
> MJ: Restate your question.
>
> Q. What was your intent at the time you went AWOL, absent without authority, from Fort Riley, Kansas, on January 30, 1991 [sic]?

TC: That's the same question, your honor.

Q. December the----

MJ: That's the exact same question. Let's ask a question that's relative to this offense.

IC (MR. WEST): Yes, sir, it is. Her intent is very relevant.

MJ: With regard to these duties, what--what was her intent?

IC (MR. WEST): What?

MJ: With regard to these duties, what was her intention in leaving?

IC (MR. WEST): I'm not going to ask that question.

25. The military judge and defense counsel then discussed the difference between "intent" and "purpose." Defense counsel then resumed his questioning as follows:

Q. Was your intent at the time you went AWOL for the purpose of avoiding hazardous duty or important service in the Persian Gulf?

A. No, it was not.

Q. What was your intent?

A. My intent at--at the time that I left was to withdraw my consent from what I saw as an illegal

and--and totally unnecessary catastrophe.

TC: Objection, your honor.

MJ: Sustained. Sustained.

IC (MR. WEST): All right. I--I feel I must make an offer of proof as to this element, and I would prefer if I may do so in closed court without the jury's presence.

* * *

[Court members were excused.]

* * *

Our offer--offer of proof at this time is that if this witness were permitted to answer this question, she would state that her intent at the time she went AWOL from Fort Riley, Kansas, on the night, I think, of December the 30th, 1990--'91--or '90, was to withdraw her support from Operation Desert Shield and to demonstrate by her--by her absence and by her unauthorized absence was to demonstrate and to expose what she felt were the illegal war plans of the United States of America to invade Kuwait [sic] and to destroy its civilian infrastructure, i.e., its economic civilian infrastructure that supported civilian life in Iraq, and that it was the intention of the United States government to destroy the power plants, the electric power plants, the sewage treatment plants, the water purification plants of Iraq, for the purpose of destroying electricity and destroying fresh water supplies, so the civilian economy would be wracked

with ruin and damnation, and so thousands of civilians would die as the result thereof.

MJ: I'm going to stop you there, Mr. West. The--the record is resplendent with--with what you felt that she was going to do. We already have that on the record, and I've already ruled on this, and I think we're just taking up valuable time at this point. I'm not going to allow that. I've explained to you my view of the law on this point several times before. The intent that's referred to in that element is a willfulness; that is to say, that she consciously and willfully made a decision that she was not going to take part in that activity. What you're talking about is--is--is her rationale for making that, and that's not a defense, and we're not going into it on the record, sir.

26. After the court members returned to the courtroom, defense counsel continued:

Q. I think it's fair to state that at this time, the time that you've stated, around November the--or around December the 30th, you have gradually and slowly reached a determination, but you finally have a crystallization of view on December 30th that you cannot participate or support Desert Shield?

A. Actually, that was December the 28th.

Q. The 28th, 29th and then 30th is when you left?

A. Correct.

Q. And you had a specific intent at the time you left to do certain things, right?

A. Right, but I--as--

Q. Don't tell us what they were.

A. No, I'm not, but as of December the 29th in the morning, I had already made my intent very clear to command here at Fort Leonard Wood, I thought.

* * *

Q. This is the order which is addressed to you and which people said handed to you., There's no doubt in your mind you received that order?

A. No. I got that late in the evening or early night of the 29th.

* * *

Q. Okay, and even with your limited military background, really limited, you knew what it meant?

A. Well, I knew that it meant that there was a strong possibility that I'd deploy to Southwest Asia.

Q. All right, and that's what you intended to avoid by going AWOL, isn't that right?

A. Well, yes and no. I mean, I had made the decision already before I even received those orders that I was not going to support Desert Shield or

Desert Storm, and I made that very clear to Colonel Abshier the morning of the 28th.

Q. Okay, so when you got your orders, you had already resolved that you weren't going?

A. I had already resolved that I was not going to support this policy in any way.

Q. All right, and now you took off, right?

A. Yes, I did.

Q. You left?

A. I left.

Q. And you went to various places while you were gone, various cities, is that correct?

A. That's correct.

CPT Huet-Vaughn then described her visits to the United Nations, the United States Congress, radio and television talk shows, community groups, and an anti-war rally. On February 2, she terminated her absence by surrendering.

27. On cross-examination CPT Huet-Vaughn testified as follows:

Q. And when you left on the 30th, you left so that you would not have to deploy to Southwest Asia, didn't you?

A. No, I did not. I left so that I could--so that I could educate and expose the nature of what I saw occurring, and so that I could withdraw my consent from--from the policy that was occurring at that time.

Q. Isn't withdrawing consent simply a convenient way of saying that you didn't want to deploy?

* * *

[Defense objection overruled.]

A. Withdrawing consent means that I did not want to support Desert Shield, whether it was in Saudi Arabia, Germany, or the United States, or anywhere else. So, I mean, included within that set of refusal to support would be Saudi Arabia, yes.

* * *

Q. All right. So whether the Army was ordering you to go to Saudi Arabia or anywhere else, you weren't going to obey that order?

A. Whether the Army was ordering me to Saudi or whether they were going to tell me to stay put at Fort Riley to support Desert Shield or whether they were going to send me to Germany, I could not, in good conscience, support that policy, no.

28. On redirect, CPT Huet-Vaughn testified as follows:

Q. Why d[illegible] you choose not to?

A. I chose to--to perform what I considered a more important service to--to the American public and to try to educate it regarding the information that I had gathered and the catastrophic nature of what was happening? [sic]

Q. Was that your intent at the time you absented yourself?

A. Yes, that was my intent. My intent was to do what I could to prevent the war from starting.

29. After CPT Huet-Vaughn testified, the defense presented numerous witnesses who testified that she was a dedicated physician, that she was sincere and caring, and that her reputation for truthfulness was impeccable.

30. The military judge refused to permit any evidence regarding the legality of the war. During cross-examination of a prosecution witness, a medical officer, defense counsel asked the effect of "destruction of Iraqi water companies, water purification plants, sewage treatment plants, and electrical plants." The military judge sustained a prosecution objection based on lack of relevance. The defense proferred two studies of medical conditions in Iraq (Def Exhibits F and G), but the military judge refused to admit them on the ground that "we're not going to litigate the morality or the legality of the war in Iraq."

31. The military judge's instructions on findings included the following:

The elements of the offense are: That, at Fort Riley, Kansas, on or about the 31st of December 1990, the accused quit her unit, to wit: the 410th Evacuation

> Hospital; that the accused did so with intent to avoid hazardous duty and/or to shirk important service, namely, deployment to Southwest Asia in support of Operation Desert Shield; that the duty and service to be performed was hazardous and/or important; that the accused knew that she would be required for such duty and/or service; and finally, that the accused remained so absent until on or about 2 February 1991. To consciously, intentionally quit one's unit to avoid hazardous duty and/or important service because of one's conscience, religion, personal philosophies, ethical or professional considerations, is not a defense. Any belief by the accused that what she might have been required to do could have been in violation of international law is not a defense . . . .

The military judge denied a defense request to instruct the members that "[i]t is a defense in this case that the accused did not intend to avoid hazardous duty or shirk important service and instead had a different intent."

32. The court-martial found CPT Huet-Vaughn guilty as charged.

Discussion

33. Appellate defense counsel for CPT Huet-Vaughn contend that the military judge erred by preventing her from presenting evidence showing her lack of specific intent to avoid hazardous duty or shirk important service. Government appellate counsel argue that evidence of CPT Huet-Vaughn's motives and her views about the unlawfulness of her deployment orders were not relevant because they did not constitute a defense.

34. To decide this case, we must analyze what the military judge said he would exclude, what he actually excluded and admitted, and how he submitted the evidence to the members during his instructions on findings. CPT Huet-Vaughn did not contest the fact that she intentionally quit her unit with knowledge that it was about to deploy to the Persian Gulf. The evidentiary contest arose from her desire to introduce evidence of her motives and reasons for refusing to support Operation Desert Shield. She tendered several reasons: that war crimes would be committed, that the war would be an environmental catastrophe, and that support of the war would be morally and ethically wrong. The defense conceded at trial that service in the Persian Gulf was hazardous duty and important service. The sole factual issue was CPT Huet-Vaughn's intent when she went AWOL.

35. The military judge excluded evidence regarding the "morality or the legality of the war in Iraq," but he permitted more evidence than contemplated by the Government's motions in limine. Considerable evidence was admitted regarding CPT Huet-Vaughn's moral, ethical, philosophical, and legal objections to the Persian Gulf war. He permitted CPT Huet-Vaughn to present evidence of her concerns about deploying "weapons of mass destruction" and its possible "catastrophic consequence," and her belief that obeying the deployment orders "would have been immoral."

36. She was permitted to testify that it was not her intent to avoid hazardous duty or shirk important service. On cross-examination she testified that she left her unit to "educate and expose the nature of what" was happening. On redirect, she testified that she "chose to--to perform what I considered a more important service to--to the American public and to try to educate it regarding the information that I had gathered and the catastrophic nature of what was

happening." Finally, she was allowed to testify that her "intent was to do what I could to prevent the war from starting."

37. Mil.R.Evid. 402, Manual for Courts-Martial, United States, 1984, provides that "[e]vidence which is not relevant is not admissible." Mil.R.Evid. 401 defines "relevant" as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

38. We have stated: "The military judge has the initial responsibility to determine whether evidence is relevant within the meaning of Mil.R.Evid. 401. We will not overturn his decision on these matters unless it is a clear abuse of discretion." United States v. Orsburn, 31 MJ 182, 187 (1990), cert. denied, 498 U.S. 1120 (1991). Furthermore, even if the evidence is relevant, the judge has great discretion in the exclusion of relevant evidence on grounds of "prejudice, confusion," or "waste of time." Mil.R.Evid. 403.

39. The issue at trial was whether CPT Huet-Vaughn left her unit "with intent to avoid hazardous duty or to shirk important service." Art. 85(a)(2), UCMJ, 10 USC § 885(a)(2). Thus, to be relevant, the proferred evidence must have tended to make her "intent to avoid hazardous duty or to shirk important service" more or less probable. If it did not tend to negate the required specific intent, it was not relevant to the defense case.

40. There are circumstances where evidence of motive or purpose is relevant circumstantial evidence of intent. See generally W. LaFave and A. Scott, 1 Substantive

Criminal Law § 3.6 at 318-23 (1986). This, however, is not such a case. We hold that the military judge did not err in ruling that CPT Huet-Vaughn's motives were irrelevant to the question whether she quit her unit with intent to avoid hazardous duty or shirk important service.

41. The relationship between intent and motive is explained by Professors LaFave and Scott as follows:

> A person often acts with two or more intentions. These intentions may consist of an immediate intention (intent) and an ulterior one (motive), as where the actor takes another's money intending to steal it and intending then to use it to buy food for his needy family . . . . It may be said that, so long as the defendant has the intention required by the definition of the crime, it is immaterial that he may also have had some other intention.

LaFave and Scott, supra, § 3.5(d) at 313 (footnote omitted). The "ultimate end sought . . . is more properly labeled a 'motive.'" United States v. Kabat, 797 F.2d 580, 587 (8th Cir. 1986), cert. denied, 481 U.S. 1030 (1987).

42. To the extent that CPT Huet-Vaughn quit her unit as a gesture of protest, her motive for protesting was irrelevant. See United States v. Johnson, 24 MJ 101, 106 (CMA 1987) (In prosecution for sabotage under 18 USC § 2155, "the accused's purpose and motive--anger, resentment, or whatever--are immaterial"); United States v. Springer, 51 F.3d 861, 868 (9th Cir. 1995) ("desire to make a political statement or engage in protest activity" not a defense to failing to surrender for service of sentence); United States v. Cullen, 454 F.2d 386, 392 (7th Cir. 1971) ("good motive does not tend to disprove . . . consciousness of wrongdoing");

United States v. Moylan, 417 F.2d 1002, 1004 (4th Cir. 1969) (motive not relevant to element of "willful intent" in destroying draft board records, "but is rather an element proper for the judge's consideration in sentencing"), cert. denied, 397 U.S. 910 (1970). Cf. United States v. Vega, 39 MJ 79, 81 (CMA 1994) ("motive to ensure safety . . . not inconsistent with" guilty plea to sabotaging aircraft "with intent to injure, interfere with, or obstruct the national defense of the United States"). If she chose to quit her unit in protest, her reasons for quitting would tend to prove rather than disprove the requisite intent.

43. To the extent that CPT Huet-Vaughn quit her unit because of moral or ethical reservations, her beliefs were irrelevant because they did not constitute a defense. See para. 14c(2)(a)(iii), Part IV, Manual, supra ("dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order"); United States v. Moylan, 417 F.2d at 1008 ("[T]he exercise of a moral judgment based upon individual standards does not carry with it legal justification or immunity from punishment for breach of the law.").

44. To the extent that CPT Huet-Vaughn quit her unit because she felt it was necessary to avoid a greater evil, the proferred evidence was irrelevant because it did not support a "necessity" defense. When "justification" or "necessity" are asserted as defenses, the evidence must tend to show that the accused had no alternative but to break the law. The defense is not available where the accused's purpose is to cause a change in government policy. United States v. Schoon, 971 F.2d 193, 198 (9th Cir.), cert. denied, 504 U.S. 990 (1992); United States v. Kroncke, 459 F.2d 697, 701 (8th Cir. 1972). Accordingly, we hold that the military judge did not abuse his discretion by excluding as

irrelevant evidence of future or potential war crimes. See United States v. Romano, 849 F.2d 812, 814 n.3- 815 (3d Cir. 1988) (upholding district court's exclusion of evidence of "alleged crimes which were or are being committed by the United States military and/or other federal officials," "international law," "divine law or other religious teaching," in prosecution for damaging military aircraft); United States v. Seward, 687 F.2d 1270, 1273 (10th Cir. 1982) (upholding district court's exclusion of evidence of "morality or immorality of nuclear weapons or nuclear power," "motive" of defendants, "wisdom" of government policy, or religious beliefs offered as a defense to trespassing at a nuclear plant site), cert. denied, 459 U.S. 1147 (1983).

45. To the extent that CPT Huet-Vaughn's acts were a refusal to obey an order that she perceived to be unlawful, the proferred evidence was irrelevant. The so-called "Nuremberg defense" applies only to individual acts committed in wartime; it does not apply to the Government's decision to wage war. See United States v. Berrigan, 283 F. Supp. 336, 341, (D.Md. 1969), aff'd sub nom. United States v. Eberhardt, 417 F.2d 1009 (4th Cir. 1969), cert. denied, 397 U.S. 909 (1970). The duty to disobey an unlawful order applies only to "a positive act that constitutes a crime" that is "so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness." United States v. Calley, 22 USCMA 534, 543, 48 CMR 19, 28 (1973), citing Lambert v. California, 355 U.S. 225, 228 (1957), and W. Winthrop, Military Law and Precedents, 296-97 (2d ed. 1920 Reprint). CPT Huet-Vaughn tendered no evidence that she was individually ordered to commit a "positive act" that would be a war crime.

46. Finally, to the extent that CPT Huet-Vaughn intended to contest the legality of the decision to employ military forces in the Persian Gulf, the evidence was irrelevant, because it pertained to a non-justiciable political question. See Flast v. Cohen, 392 U.S. 83, 95 (1968) ("political question" not justiciable by federal courts); Ange v. Bush, 752 F. Supp. 509, 518 n. 8 (DC 1990) ("[T]he decision as to whether to deploy United States troops is not a judicial function.").

47. We turn finally to the military judge's instruction that quitting one's unit "because of one's conscience, religion, personal philosophies, ethical or professional considerations, is not a defense." Although the military judge permitted CPT Huet-Vaughn to testify about her moral and ethical objections to the war, his instruction undercut any defense based on those objections. In effect, the members were told to disregard such evidence when they deliberated on findings. This instruction had the same effect as excluding the evidence, but it was a correct statement of the law. See United States v. Berrigan, supra; accord United States v. Perl, 584 F.2d 1316, 1322 (4th Cir. 1978), cert. denied, 439 U.S. 1130 (1979); United States v. Dougherty, 473 F.2d 1113, 1138 (DC Cir. 1972).

48. Appellate defense counsel cite several military cases that warrant comment. In United States v. Shull, 1 USCMA 177, 2 CRM 83 (1952), this Court found insufficient evidence of intent to shirk important service. In our view, Shull undercuts CPT Huet-Vaughn's argument, because this Court there held:

> It is enough, we hold, that in a case of this nature a court-marital determine on the basis of substantial evidence that the duty was imminent, and that as a

> consequence of his unauthorized absence the accused in fact avoided it or had reasonable cause to know that he would do so . . . .

1 USCMA at 182-83, 2 CMR at 88-89. This Court then concluded that the evidence was insufficient to establish that the accused knew that he would miss his overseas deployment by overstaying his pass. Id.

49. In United States v. Cline, 2 USCMA 411, 9 CMR 41 (1953), this Court held that the accused's testimony was sufficient to raise an issue regarding his intent to desert. The accused had testified that his lieutenant told him "to leave, to go back to the front or back to regiment or to go otherwise." The accused testified that later in the conversation the lieutenant told him "to get to regiment or to Pusan [, Korea] or someplace in that location." 2 USCMA at 412, 9 CMR at 42. The accused went to his regimental headquarters and then to Pusan, where he was apprehended. Our Court held that the accused's testimony "raised the issue of whether he had ever formed an intention to desert." 2 USCMA at 413, 9 CMR at 43. Unlike Private Cline's order from his lieutenant, CPT Huet-Vaughn's deployment orders were not ambiguous or conflicting. She testified unequivocally that ~~she~~ understood her deployment orders, but she decided that she could not in good conscience support the deployment to the Persian Gulf.

50. In United States v. McIntyre, 2 USCMA 559, 10 CMR 57 (1953), this Court affirmed a conviction of desertion with intent to avoid hazardous duty. The accused had "left his unit shortly before it was scheduled to make an attack." 2 USCMA at 560, 10 CMR at 58. His only contention at trial was "that Army food make him sick and he left the forward area for that reason." 2 USCMA at 561,

10 CMR at 59. This Court upheld the law officer (now military judge)'s refusal to instruct that it was a defense if the accused "in good faith felt he was unable to perform his duty." Our Court held that such a defense was not raised by the evidence. CPT Huet-Vaughn's excuse for leaving her unit, like Private (PVT) McIntyre's, did not raise a defense.

51. In United States v. Apple, 2 USMCA 592, 10 CMR 90 (1953), our Court held that the law officer erred by failing to submit the issue of intent to the court members. In Apple the accused testified that he did not intend to avoid hazardous duty but that he left his unit, located on the main line of resistance, and went to the rear "to see what had occasioned the evident confusion in his records with respect to rotation points." 2 USCMA at 593, 10 CMR at 91. PVT Apple, like CPT Huet-Vaughn, testified that he did not intend to avoid hazardous duty. Unlike CPT Huet-Vaughn's testimony, however, PVT Apple's testimony suggested that he believed he had discharged his duty to serve in the combat zone and was eligible for rotation out of the combat zone. Unlike CPT Huet-Vaughn, PVT Apple did not testify that he would refuse to support the war effort whether his rotation points were correctly computed and entered in his records. Unlike PVT Apple's case, CPT Huet-Vaughn's intent was submitted to the trier of fact with appropriate instructions.

52. In United States v. Williams, 10 CMR 219 (ABR 1953), the accused was charged with deserting his unit with intent to remain away permanently. The board of review (now Court of Criminal Appeals) held that the law officer erred by refusing to admit evidence supporting the accused's testimony that he absented himself to complete work on an invention and that he always intended to return to the Army after completing his invention. 10 CMR at 220. This case is distinguishable from CPT Huet-Vaughn's case

because the intent at issue is different. The evidence proferred by PVT Williams supported his intent to remain away only temporarily and, as such, was relevant. The evidence proferred by CPT Huet-Vaughn did not negate her intent to avoid deploying to the Persian Gulf. To the contrary, it tended to prove that she intended to avoid deployment by showing that she was opposed to the war on moral and humanitarian grounds.

Based on the discussion above, we answer the certified question in the negative.

The decision of the United States Army Court of Miliary Review on reconsideration is set aside. The record of trial is returned to the Judge Advocate General of the Army for remand to the Court of Criminal Appeals for further review.

Judges COS, CRAWFORD, and WISS concur.

SULLIVAN, Chief Judge (dissenting in part and concurring in the result);

53. I disagree with the majority's rationale in this case. I would hold that it was error for the military judge to prevent CPT Huet-Vaughn from explaining her state of mind at the time she left her unit. United States v. Huff, 7 USCMA 247, 250, 22 CMR 37, 40 (1956) ("[A]n accused cannot be denied every opportunity to present evidence at the trial to negate the existence of every element of the offense charged.").

54. Under our case law CPT Huet-Vaughn's mental processes were relevant to determine whether she had an intent to avoid hazardous duty or shirk important service

as required by Article 85, Uniform Code of Military Justice, 10 USC § 885. See United States v. Apple, 2 USCMA 592, 10 CMR 90 (1953); United States v. McIntyre, 2 USCMA 559, 10 CMR 57 (1953); United States v. Cline, 2 USCMA 411, 9 CMR 41 (1953); United States v. Shull, 1 USCMA 177, 2 CMR 83 (1952) (evidence of different intents other than to avoid hazardous duty or shirk important service are relevant to disprove the required intent for desertion); cf. United States v. Kabat, 797 F.2d 580, 588-89 (8th Cir. 1986) (in prosecution for sabotage under 18 USC §2155 no error for trial judge not to specifically instruct on motive evidence which had been admitted during trial on merits to negate specific intent), cert. denied, 481 U.S. 1030 (1987). The majority's attempt to distinguish these cases is not persuasive.

55. However, I agree with the majority that the record shows that CPT Huet-Vaughn was not prevented from explaining her reasons for leaving her unit to the members. Accordingly, I find that the error committed by the military judge in granting the motion in limine was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967).

APPENDIX C

UNITED STATES ARMY COURT OF MILITARY REVIEW

Before
CREAN, GRAVELLE, and GONZALES
Appellate Military Judges

UNITED STATES, Appellee	ACMR 9101873
v.	United States Army Engineer Center and Fort Leonard Wood
Captain YOLANDA M. HUET-VAUGHN 515-56-4888 United States Army, Appellant	

For Appellant: Hillary Richard, Esquire, Louis P. Font, Esquire (argued); Luther C. West, Esquire, Thomas D. Ensign, Jose Luis Morin, Michael Ratner, Captain Deborah H. Hooper, JAGC, Edward Copeland, Esquire, Thomas Fox, Esquire, Major James M. Heaton, JAGC, Captain Emmett G. Wells, JAGC, (on brief). Hillary Richard, Esquire, Louis P. Font, Esquire, Luther C. West, Esquire, Thomas D. Ensign, Captain Michael A. Egan, JAGC (on brief).

For Appellee: Major Donna L. Barlett, JAGC (argued); Colonel Dayton M. Cramer, JAGC, Lieutenant Colonel Joseph A. Russelburg, JAGC, (on brief). Colonel Dayton M. Cramer, JAGC, Major James L. Pohl, JAGC, Captain Gregory T. Baldwin, JAGC (on brief).

25 January 1994

OPINION OF THE COURT ON RECONSIDERATION

GONZALES, Judge:

Contrary to her plea, the appellant was found guilty on 9 August 1991, by a general court-martial composed of officer members, of desertion with the intent to avoid hazardous duty and shirk important service in violation of Article 85, Uniform Code of Military Justice, 10 U.S.C. §§ 885 (1988) [hereinafter UCMJ]. The appellant was sentenced to a dismissal from the service, confinement for 30 months, and forfeiture of all pay and allowances. On 3 December 1991, in the exercise of his clemency powers, the convening authority reduced the period of confinement to 15 months, but otherwise approved the sentence as adjudged.

On 25 February 1992, the Army Clemency and Parole Board determined that the appellant's release from confinement on parole was not warranted.[1] However, the appellant appealed the board's decision to the Deputy Assistant Secretary of the Army for Department of the Army Review Boards and Equal Employment Opportunity Compliance and Complaints Review who ordered the appellant's release on 6 April 1992, after 240 days of confinement. He also remitted the remaining seven months of her approved sentence to confinement.

Before this court, the appellant asserts that the military judge's exclusion of defense evidence and witnesses on the element of her "specific intent" at the time of the offense was prejudicial error. She further contends that the actions of the military judge in denying her the right to submit proof on her "specific intent" as it pertained to war crimes and the planning

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[1] The Board noted there was community support for the appellant's release. However, the Board also noted that "many other doctors who were called to serve [their] country during the war reported for duty. This was [the appellant's] duty also and [she] failed to live up to [her] agreement."

of the war effort against Iraq at the highest levels of the United States Government gave the appearance of unlawful command influence. We initially agreed only with the appellant's first assignment of error and issued an opinion to that effect on 29 October 1993. The government filed a Petition for Reconsideration and Suggestion for En Banc on 18 November 1993. The appellant filed a response on 13 December 1993. We vacated our original opinion on 14 January 1994. United States v. Huet-Vaughn, ACMR 9101873 (A.M.C.R. 14 Jan. 1994) (order) (unpub.). We also granted the government's request for reconsideration, but the Suggestion for En Banc was unanimously rejected by the full court.[2]

We have reconsidered our decision as to the appellant's first assignment of error. We hold that the military judge committed prejudicial error when he granted the government's motion in limine to restrict the appellant from testifying and presenting other evidence of her motive to contest the element of specific intent charged in the desertion offense.

I. Facts

The appellant joined the United States Army Reserve as a captain in the Medical Corps on 18 June 1990, and was assigned to the 325th General Hospital in Independence, Missouri. Among her personal reasons for joining were public service and the thought that she would gain credibility and be more effective in her community as an anti-nuclear activist. Between 18 and 26 December 1990, she and other medical personnel from her reserve unit were ordered to active duty at Fort Leonard Wood, Missouri. Subsequently, on 29 December 1990, she was reassigned to the 410th Evacuation Hospital that had mobilized at Fort Riley, Kansas, pending its deployment to

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[2] One judge recused himself from voting on the Suggestion for En Banc.

Southwest Asia in support of Operation Desert Shield.[3] The appellant absented herself from the Army on 31 December 1990 and remained absent until 2 February 1991, when she voluntarily returned to military control. The desertion charge was preferred against her on 6 March 1991, and it was referred to trial on 6 June 1991, by the general court-martial convening authority at Fort Leonard Wood, Missouri.

The military judge's rulings that are the subject of the appellant's two assignments of error occurred at the second Article 39(a), UCMJ, session on 15 July 1991, when the government made a two-part motion in limine. The first part sought to exclude any defense evidence on the merits that pertained to the appellant's alleged status as a conscientious objector,[4] and the dictates of her conscience, religion,

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[3] The 410th Evacuation Hospital deployed to a location 30 miles south of the Iraqi border near Qaysumah, Saudi Arabia, on 27 January 1991, to support VII Corps. The unit returned to Fort Riley, Kansas, in May 1991.

[4] During the Article 39(a), UCMJ, session, the appellant's civilian defense counsel mentioned that the appellant absented herself during a period of time when no one could file an application for conscientious objection (CO) status. The Army's policy concerning the filing of such an application in December 1990 was stated in Desert Shield Personnel Message (DSPM) Number 31 - Personnel Applying for Conscientious Objector Status, issued on 19 October 1990. It provided that a soldier who had not filed a formal application for CO status before his/her unit was alerted for deployment could not submit such an application until his/her arrival in Saudi Arabia. This policy was addressed in three cases before this court earlier this year and found to be an unlawful change to Army Regulation 600-43, Personnel--General: Conscientious Objection (7 Aug. 1987) [hereinafter AR 600-43], and thus had no legal affect. See United States v. Johnson, 37 M.J. 982 (A.C.M.R. 1993), United States v. Wiley, 37 M.J. 885 (A.C.M.R. 1993), and United States v. Walker, 37 M.J. 892 (A.C.M.R. 1993). In all three cases, this court found that the provisions of AR 600-43 rendered an applicant for CO status ineligible

philosophy, and beliefs on the conflict in Southwest Asia based

for overseas deployment from the time he/she filed or attempted to file an application until Headquarters, Department of the Army, acted on the application.

In Johnson, this court determined that Specialist (SPC) Johnson was ineligible for overseas service under AR 600-43 due to his attempt to file an application for CO status in October 1990 and, therefore, set aside the findings of guilty of missing movement overseas through design and willful disobedience of a superior commissioned officer's order to deploy overseas in violation of Articles 87 and 90, UCMJ. We note that SPC Johnson never left military control at Fort Bliss and performed all other military duties in a satisfactory manner.

In Wiley, this court determined that Sergeant (SGT) Wiley was also ineligible for deployment to Southwest Asia under AR 600-43 due to his attempts to file an application for CO status twice in December 1990. The findings of guilty of desertion with intent to avoid hazardous duty and shirk important service, and missing movement through design in violation of Articles 85 and 87, UCMJ, were set aside. However, the court affirmed a finding of guilty of the lesser included offense of absence without leave because SGT Wiley left his unit without authority for four days, during which time his unit deployed, rather than remain with the unit's rear detachment and perform other duties.

In Walker, this court determined that SPC Walker was ineligible for deployment under AR 600-43 because he had filed an application for CO status in November 1990. The court set aside the findings of guilty for missing movement and disobedience of a lawful order in violation of Articles 87 and 90, UCMJ. Even though SPC Walker declined to participate in Operation Desert Shield, he remained with his unit's rear detachment and performed duties at the Military Affiliated Radio Systems (MARS) station.

There is no evidence that the appellant filed or attempted to file an application for CO status until 7 February 1991. By that time, the Army had revised DSPM 31 to allow soldiers to file an application for CO status at their present duty station, reserving to the commander exercising general court-martial convening authority the decision whether the applicant would deploy to Southwest Asia.

on relevancy under Military Rules of Evidence 401, 402, and 802 [hereinafter M.R.E.]. The second part sought to limit any defense evidence and testimony on the merits and in extenuation and mitigation pertaining to the appellant's personal beliefs on the legality of the war in Southwest Asia.

The appellant responded to the first part of the motion by asserting that she and her corroborating witnesses should be allowed to explain to the court members why she quit her unit in December 1990. She contended that their testimony would show that her reason for refusing to deploy was not based on a specific intent "to avoid hazardous duty and shirk important service." Rather, her intent was solely to expose to the public the war crime nature of the impending Persian Gulf war. In response to the second part of the government's motion the appellant argued that she should be allowed to show the court members that she had a good-faith belief that war crimes would be committed during Operation Desert Shield and, therefore, she had an honest and reasonable belief that she was authorized under the Nuremburg Principles and Department of the Army Field Manual 27-10, Law of Land Warfare, July 1956, to refuse to participate in the conflict. She further argued that her testimony and the testimonies of her witnesses were relevant to her defense of mistake of fact. In summary, the appellant asserted that the government's motion in limine, was really an attempt by the government to prevent her from contesting the "specific intent" element of proof on the desertion charge and from raising the defense of mistake of fact to both the charge of desertion and its lesser included offense of absence without leave.

The military judge granted both parts of the government's motion in limine and stated that the appellant's reasons for refusing to deploy were not relevant and did not constitute a defense. He also indicated that her refusal to deploy to a combat environment because she had a good-faith

belief that somebody might commit a war crime was also not a defense. However, before the Article 39(a), UCMJ, session ended, the military judge amended his ruling by stating that he would allow the appellant to testify, to a limited extent, on the merits as to her intentions at the time she absented herself. He also stated he would allow the appellant to testify without limitation on her intentions in extenuation and mitigation.

At the beginning of the next Article 39(a), UCMJ, session on 5 August 1991, the appellant's individual defense counsel asked the military judge to clarify his rulings on the motions as there appeared to be some confusion as to when the appellant could testify about her intent. The military judge stated that the appellant could testify in extenuation and mitigation as to her intent at the time she absented herself. In this regard, he also granted the appellant's request for thirteen of fifty-one witnesses. Two of the thirteen witnesses, Lieutenant Colonel Abshier and Major Borserine, were listed on the appellant's written request (Appellate Exhibit XXVI) as being called to testify on the appellant's motives for her absence. However, the military judge said nothing concerning the defense presenting any testimony on the merits about the appellant's intentions.

At the next Article 39(a), UCMJ, session the following day, the appellant's individual defense counsel again asked the military judge to clarify his rulings on when the appellant could testify about her intent. The military judge made the following comments on the record:

> Now, I had promised you in chambers that I would, on the record, state my rulings. . . To clarify them and so you would know exactly what my position is, which apparently was not clear to you. The litigation that we so laboriously went through had to do with the

> element of the offense that is as follows: That the accused did so with intent to avoid hazardous duty and/or to shirk important service; namely, deployment to Southwest Asia in support of Operation Desert Shield. At issue is whether the accused consciously, intentionally quit her unit so she would not have to perform this hazardous duty and/or important service. To consciously, intentionally quit one's unit to avoid hazardous duty and/or important service because of one's conscience, religion, or personal philosophies is not a defense. Testimony on the merits of this case relating to such contentions is therefore irrelevant, and timely objections made by the prosecution to questions eliciting such testimony will be sustained. Likewise, to consciously, intentionally quit one's unit to avoid hazardous duty and/or important service because of one's belief that she may be asked to become a principle in an--in an illegal act, i.e. a war crime, is speculative and is likewise not a defense. Testimony on the merits of this case relating to such contentions is therefore irrelevant, and timely objections made by the prosecution to questions eliciting such testimony will be sustained. I think that makes my position absolutely clear.

Subsequently, the appellant's individual defense counsel made reference to the military judge's rulings in his opening statement to the court members. He stated that the appellant did not intend to avoid hazardous duty, but that he was restricted from telling them what was the appellant's true specific intent when she absented herself. At the conclusion of the individual

defense counsel's opening statement, the judge made the following comments to the court members:

> I'll comment briefly on the opening statement, because the references kind of leave you dangling as to what it is that I've ruled and--and what it is that you will or will not be able to consider, depending on what the objections are by counsel. The element in question that's been referred to by Mr. West on various occasions is that the accused did so--that is, to--the first element is that she quit her unit. The second element is the one that's--that's in--that he's been talking about all along. And the element is that the accused did so with intent to avoid hazardous duty and/or to shirk important service; namely deployment to Southwest Asia in support of Operation Desert Shield. At issue is whether the accused consciously, intentionally quit her unit so she would not have to perform these duties. To consciously, intentionally quit one's unit to avoid hazardous duty and/or important service because of one's conscious--excuse me--conscience, religion, or personal philosophies is not a defense. It may be a motive, but it's not a defense. And therefore what I've indicated to Mr. West and I think that he understands is that timely decisions with regard to those things, I will sustain objections to, because they're not relevant. The question is whether she consciously, intentionally quit her unit so she wouldn't have to perform the duties. And I'll explain the rest of the elements later.

Of the ten government witnesses who testified on the merits, Specialist Kelsey and Captain Mings, testified to oral

statements made by the appellant to prove that the appellant intended to avoid hazardous duty or shirk important service. None of the appellant's eighteen witnesses who testified on the merits, however, were allowed to testify in any manner that would contest the element of intent.

Despite the military judge's rulings, the appellant was able to twice very briefly express her reasons for quitting her unit during direct examination over the repeated objections by the trial counsel. She also very concisely stated her reasons once during the trial counsel's cross-examination of her. Finally, her best effort to capsulize her reasons came during redirect examination when her individual defense counsel asked her the final question of why she chose not to deploy. The appellant answered:

> I chose to--to perform what I considered a more important service to--to the American public and to try to educate it regarding the information that I had gathered and the catastrophic nature of what was happening. . . that was my intent. My intent was to do what I could to prevent the war from starting.

In all four instances of trying to explain her intent to the court members, the military judge did not permit her to go beyond a sketchy summary of her reasons.

After both the government and the defense rested their cases on the merits, the appellant made a motion for a finding of not guilty based on the government's failure to prove that the appellant intended to "avoid hazardous duty and shirk important service.[5] The military judge denied the motion and commented:

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[5] The appellant also made an unsuccessful motion for a finding of not guilty at the conclusion of the government's case.

> As--as I explained to you before, what you speak of, in the view of the court, were her motivations. The question is, did she do what she did intentionally, willfully? That's the question. Not what her motives for doing or not doing an intentional act were. Your motion is denied.

In line with his rulings on the motion in limine and the motion for a finding of not guilty, the military judge's instructions to the court members on the elements of proof for desertion included a deviation from the standard instruction. Dep't of the Army Pam. 27-9, Military Judges' Benchbook, para. 3-10 (1 May 1982) (C1, 15 Feb. 1985). The military judge inserted the following between the instruction on the five elements of proof for desertion and defining the word "quit":

> To consciously, intentionally quit one's unit to avoid hazardous duty and/or important service because of one's conscience, religion, personal philosophies, ethical or professional considerations, is not a defense.[6] Any belief by the accused that what she might have been required to do could have been in violation of international law is not a defense.

II. The Offense of Desertion

The five elements of proof for desertion are: (1) that the accused quit her unit, organization, or other place of duty; (2) that the accused did so with the intent to avoid a certain

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[6] This language is similar to Manual for Courts-Martial, United States, 1984, Part IV, para. 14c(2)(a)(iii) [hereinafter MCM, 1984], concerning the lawfulness of an order given by a superior commissioned officer.

duty or shirk a certain service; (3) that the duty to be performed was hazardous or the service important; (4) that the accused knew that he or she would be required for such duty or service; and (5) that the accused remained absent until the date alleged. Manual for Courts-Martial, United States, 1984, Part IV, para. 9b(2) [hereinafter MCM, 1984].

In Article 85, UCMJ, Congress declared that a particular kind of criminal intent must be found. United States v. Wimp, 4 C.M.R. 509, 511 (C.G.B.R. 1952). This criminal intent is described in three different forms: intent to remain away permanently, intent to avoid hazardous duty, and intent to shirk important service. 10 U.S.C. §§ 885(a)(1) and (2). Where an offense included as an element of proof, an intent to do a further act or achieve a future consequence, such an intent is referred to as "specific intent" and the crime as a specific intent crime. United States v. Holder, 7 U.S.C.M.A. 213, 22 C.M.R. 3, 5 (1956); United States v. Welstead, 36 C.M.R. 707, 710 (A.B.R. 1966); United States v. Victor, 24 C.M.R. 433, 435 (A.B.R. 1957). Proof of a required specific intent is just as necessary as proof of the act itself, and it must be established as an independent fact and with the same certainty as any other element either by direct or circumstantial evidence. United States v. Sterley, 764 F.2d 530, 532 (8th Cir. 1985), cert. denied, 474 U.S. 1013 (1985); United States ex rel. Vraniak v. Randolph, 261 F.2d 234, 237 (7th Cir. 1958), cert. denied, 359 U.S. 949 (1959). In a desertion case, intent does not necessarily exist merely because an absence is proven. United States v. Guthrie, 12 C.M.R. 299, 302 (A.B.R. 1953).

III. Intent and Motive

The central issue in this case is whether the appellant had the requisite intent. We, therefore, must address what is intent and, under the circumstances of this case, how evidence of motive is related to it. In the popular mind, intent and

motive are not infrequently regarded as one and the same thing. However, in law there is a clear distinction between the two.

Intent refers only to the state of mind when the act is done. United States v. Fleming, 7 U.S.C.M.A. 543, 23 C.M.R. 7, 20 (1957); United States v. Simpson, 950 F.2d 1519, 1525 (10th Cir. 1991). It is intent that determines the criminality of the act. United States v. Tilton, 34 M.J. 1104, 1107 (A.C.M.R. 1992). Intent becomes an issue at trial when it is a contested element of an offense. United States v. Franklin, 35 M.J. 311, 317 (1992). Intent is seldom susceptible to proof by direct evidence. United States v. Hammond, 642 F.2d 248, 250 (8th Cir. 1981). Without an admission from the accused, the question of intent must be inferred from the facts and circumstances which tend to explain the accused's mental attitude. Rose v. Clark, 478 U.S. 570, 581 (1986); United States v. Shull, 1 U.S.C.M.A. 177, 2 C.M.R. 83, 89 (1952) (Litimer, J., dissenting).

Motive, on the other hand is the human emotion which incited, stimulates, or prompts a person to act, and is the reason for a person's behavior. United States v. Lips, 22 M.J. 679, 682 (A.F.C.M.R. 1986), pet. denied, 24 M.J. 45 (C.M.A. 1987); United States v. Fleming, 23 C.M.R. at 20. Motive has also been described as that which prompts the choice or moves the will, thereby inciting or inducing action. State ex rel. City of Creve Coeur v. Weinstein, 329 S.W.2d 399, 405 (Mo. App. 1959); City of Kirkwood v. Venable, 173 S.W.2d 8, 12 (Mo. 1943). Motive can never be an essential element of a crime, but a person's motive may be considered by the trier of fact in determining the person's intent. United States v. Richmond, 700 F.2d 1183, 1195 (8th Cir. 1983). Proof as to motive may be of assistance in throwing light on the intent with which the act was committed. United States v. Spaeth, 152 F. Supp. 216, 221 (N.D. Ohio 1957), affirmed, 254 F.2d 924 (6th Cir. 1958), cert. denied, 358 U.S. 831 (1958). Good motive alone is never

a defense where the act done or admitted is a crime. United States v. Simpson, 950 F.2d at 1525. If a person does an act which the law denounces as a crime, motive is immaterial, except insofar as evidence of motive may aid the trier of fact to determine the accused's intent. United States v. Fleming, 19 C.M.R. 438, 448 (A.B.R. 1955); United States v. Snow, 670 F.2d 749, 754 n.9 (7th Cir. 1982); United States v. Hammond, 642 F.2d at 250.

In a desertion case, the court must consider the intent of the accused. United States v. Cothern, 8 U.S.C.M.A. 158, 23 C.M.R. 382 (1957). Where the intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the fact finder. Morissette v. United States, 342 U.S. 246, 274 (1952); United States v. Huff, 19 C.M.R. 603, 606 (C.G.B.R. 1955). Proof of intent may be shown by acts or declarations of the accused prior to the offense and during the absence. United States v. Welsh, 33 C.M.R. 502, 503 (A.B.R. 1963). Whenever the intent of the accused is in issue, the accused may testify as to his motives. United States v. Wade, 28 C.M.R. 704, 708 (C.G.B.R. 1959). Even though the evidence militating against the presence of a specific intent may come only from the lips of the accused, it is nonetheless fully competent to place the question of intent squarely in issue. United States v. Apple, 2 U.S.C.M.A. 592, 10 C.M.R. 90, 92 (1953). While such testimony may be self-serving, it is open to cross-examination and hence receivable as independent evidence. United States v. Rainer, 27 C.M.R. 833, 840 (N.B.R. 1958). When an accused's testimony raises an issue of fact with respect to intent, it can only be resolved by weighing the fair inferences that may be drawn from the facts established by the government against the accused's testimony. United States v. Foster, 29 C.M.R. 633, 634 (A.B.R. 1960).

An accused cannot be denied the opportunity to present evidence at trial to negate the existence of every element of the offense charged. United States v. Huff, 7 U.S.C.M.A. 247, 22

C.M.R. 37, 40 (1956). This court, its predecessor, and the United States Court of Military Appeals have reviewed numerous cases over the past forty-two years where an accused charged with desertion pled not guilty and presented evidence on the merits in an effort to contest or explain that his intent was other than to remain away permanently, or to avoid hazardous duty, or to shirk important service. United States v. Wilson, 20 U.S.C.M.A. 71, 42 C.M.R. 263 (1970); United States v. Gaines, 17 U.S.C.M.A. 481, 38 C.M.R. 279 (1968); United States v. Martin, 16 U.S.C.M.A. 531, 37 C.M.R. 151 (1967); United States v. Cooper, 16 U.S.C.M.A. 390, 37 C.M.R. 10 (1966); United States v. Cline, 2 U.S.C.M.A. 411, 9 C.M.R. 41 (1953); United States v. Kim, 35 M.J. 553 (A.C.M.R. 1992); United States v. Fields, 46 C.M.R. 1012 (A.C.M.R. 1972); United States v. Hamilton, 41 C.M.R. 724 (A.C.M.R. 1970); United States v. Anderson, 38 C.M.R. 582 (A.B.R. 1967); United States v. Miller, 33 C.M.R. 563 (A.B.R. 1963); United States v. Niepoky, 29 C.M.R. 625 (A.B.R. 1960); United States v. Victor, 24 C.M.R. 433 (A.B.R. 1957); United States v. LaRue, 13 C.M.R. 296 (A.B.R. 1953); United States v. Guthrie, 12 C.M.R. 299 (A.B.R. 1953); United States v. Peregrina, 8 C.M.R. 293 (A.B.R. 1953); and United States v. Parker, 2 C.M.R. 457 (A.B.R. 1952).[7]

The Army Board of Review in Guthrie recognized that the accused's evidence to negate the intent to shirk important service was relevant. The Board stated that proof is permissible to show that a different intent existed, but that an accused's explanatory testimony will not necessarily vitiate the reasonable inferences arising from facts established by the prosecution. However, Private Guthrie's testimony of having an intent other than to shirk important service was corroborated in many

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[7] In some of these sixteen cases, the evidence to contest or explain the accused's intent had the opposite effect and, instead, contributed to the inference that the accused possessed the requisite intent.

particulars by evidence which could not reasonably be disbelieved. Thus, the Board was compelled to conclude that there was a reasonable doubt that the accused possessed the intent to shirk important service. Guthrie, 12 C.M.R. at 302.

The Court of Military Appeals also noted in Cline that the accused's testimony on the merits raised the issue of whether Private Cline had ever formed an intent to avoid hazardous duty. It concluded that the evidence could only support the lesser included offense of absence without leave. United States v. Cline, 9 C.M.R. at 43.

It is quite clear from the precedents cited above, that each of the accused was permitted to testify and offer other evidence to contest the element of intent. The appellant and her four corroborating witnesses, Lieutenant Colonel Abshier, Major Borserine, Professor Swomley, and Ms. Kidder, were not afforded the same full opportunity on the element of intent when they testified.[8]

The government's Petition for Reconsideration and Suggestion for En Banc cited several federal circuit courts of appeal cases for the proposition that evidence of motive cannot negate specific intent and, therefore, is irrelevant on the merits. United States v. Komisaruk, 885 F.2d 490 (9th Cir. 1989); United States v. Kabat, 797 F.2d 580 (8th Cir. 1986); United States v. White, 766 F.2d 22 (1st Cir. 1985); United States v. Dorrell, 758 F.2d 427 (9th Cir. 1985); United States v. Snow, 670 F.2d 749 (7th Cir. 1982). We note that there is one feature in each of these cases that distinguishes them from the circumstances in Huet-Vaughn. Unlike the appellant, none of

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[8] The testimonies of the appellant and her four corroborating witnesses would have been sufficient to describe the appellant's motive on the element of intent to the court members without the need to call additional witnesses.

the accused in these five cases contested the element of specific intent. Komisaruk did not deny that she wanted to damage everything in sight at the ground control center for the Navstar military navigation system at Vandenberg Air Force Base (AFB). All of the defendants in Kabat testified that they intended to disarm a Minuteman II missile and thus interfere with the current U.S. defense policies. The defense acknowledged that White knowingly chose to possess cocaine with the intent to distribute it. Dorrell admitted he intended to enter Vandenberg AFB with the intention of damaging MX missiles. Snow passed Federal Reserve Notes that he knew were counterfeit with the intent to bring about a financial gain to himself. In the case now before us, the appellant's defense at trial was to focus squarely upon the specific intent element and to contest it; it was not conceded.

IV. Decision

The military judge correctly viewed the appellant's evidence as to why she left her unit as tending to establish her motive, meaning her reasons for choosing to quit her unit. While evidence of motive is not an affirmative defense to desertion, it may be considered by the trier of fact to determine whether the appellant had the specific intent charged in the desertion offense, i.e. to avoid hazardous duty or shirk important service. The military judge's ruling went beyond what the government was entitled to receive in its motion in limine,[9] and severely hampered the appellant's defense strategy

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[9] The contents of the government's written motion in limine may have contributed to the military judge's overly broad ruling. Portions of the motion described the appellant's absence in terms of willful disobedience of an order, relying on MCM, 1984, Part IV, para. 14a(2)(a)(i) and (iii) which states that an order to perform military duty may be inferred to be lawful and that the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the

to contest the specific intent element of desertion.[10] Accordingly, we hold that the military judge committed prejudicial error when he restricted the appellant from testifying and presenting other evidence of motive to contest the element of specific intent charged in the desertion defense.[11] See United States v. Cofield, 11 M.J. 422, 433 (C.M.A. 1981) and United States v. Barnes, 8 M.J. 115, 117 (C.M.A. 1979).

When the government elects to charge an accused with a specific intent crime, the soldier must be given the opportunity

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disobedience of a lawful order. The appellant, however, was never charged with the willful disobedience of an order in violation of Article 90, UCMJ.

[10] Even if the appellant had been able to present her motive evidence, the fact finder nevertheless could have convicted her of desertion with the intent to avoid hazardous duty and shirk important service, and adjudged a sentence that included confinement and a dismissal. The court is not bound to accept the accused's testimony on intent. United States v. Victor, 24 C.M.R. at 435. Explanatory testimony by an accused will not necessarily avoid reasonable inferences arising from the operative facts established by the prosecution. United States v. Perry, 10 C.M.R. 387, 389 (A.B.R. 1953). Even when the defense offers evidence to counter the inferences which could be raised from the facts, the court can draw its own conclusions from the evidence. United States v. McPherson, 33 C.M.R. 542, 545 (A.B.R. 1963). It is the primary duty of the court members to weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact under appropriate instructions, and, in doing so, the court members could reasonably reject the accused's disclaimer of entertaining the specific intent charged. United States v. Justice, 14 C.M.R. 669, 676 (A.F.B.R. 1953).

[11] It would be error to read our decision to mean that soldiers are now free to pick and choose which wars or battles to fight. See footnote 10. Nor does our opinion create a new affirmative defense to a charge of desertion predicated on a soldier's "anti-war," "immoral war," "illegal war," "unnecessary war" sentiments or "public health," "preventive medicine," "humanitarian," or "moral" views.

to fairly contest each element of proof. A soldier should not be unfairly restricted from placing the question of intent squarely in issue before the fact finder, because that element of proof is the aggregating factor that greatly increases the severity of possible punishment. MCM, 1984, Part IV, paras. 9c(2) and 9e(1). When intent is contested, evidence of motive is relevant under M.R.E. 401 and 402 to aid the fact finder to determine intent.[12]

Although the appellant was limited in this regard in the presentation of her defense, we find there is ample evidence including the appellant's own admissions during her testimony on the merits, to support a finding a guilty of a thirty-three-day absence without authority, beyond a reasonable doubt.[13] United States v. Cline, 9 C.M.R. at 43. The maximum punishment for this lesser included offense for a commissioned officer is dismissal, confinement for one year, and forfeiture of all pay and allowances. MCM, 1984, para. 10e(2)(c) and R.C.M. 1003(b)(10)(A). This court has the discretion to approve the

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[12] In another recent desertion case, this court stated that the "appellant's actual motivation for leaving his unit is unimportant, if as a consequences of that unauthorized absence appellant had reasonable cause to know that he would avoid important service." United States v. Kim, 35 M.J. 553, 555 (A.C.M.R. 1992). We note that the court did not state that such evidence was irrelevant or inadmissible. Like the appellant in the instant case, SPC Kim pled not guilty; but unlike the instant case, he was permitted to present his motive evidence before the fact finder on the element of intent.

[13] In his opening statement to the court members, the appellant's counsel stated that the "lesser included offense of AWOL is far more appropriate than the filing of desertion in this case and we hope that upon the conclusion of this case that you gentlemen will agree and reach that verdict in this case." In his closing argument on the merits, he admitted that the "government has proven the other--other elements of this crime [except intent] eloquently. They've proven she was absent without leave. . . ."

lesser offense of absence without leave and reassess the sentence, or it may order a rehearing on the desertion charge. United States v. Cothern, 23 C.M.R. at 385; United States v. Sales, 22 M.J. 305 (C.M.A. 1986).

We adhere to our original opinion that the appellant's second assignment of error has absolutely no merit. Each counsel representing the appellant during the oral argument was asked to provide a specific fact, other than the collective speculation contained in their appellate brief, for alleging that the military judge's actions gave the appearance of unlawful command influence, so as to warrant a hearing pursuant to United States v. DuBay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967). Each counsel acknowledged that he or she had nothing to add for our consideration. Because the appellant offers no colorable scenario to support her contention and because the record is not consistent with such a claim, we find that this assignment of error is completely baseless and warrants no relief. See United States v. Dykes, 38 M.J. 270 (C.M.A. 1993); United States v. Lonetree, 35 M.J. 396, 414 (C.M.A. 1992).

The findings of guilty of the Charge and its Specification are set aside. The sentence is set aside subject to the conditions hereinafter stated. The same convening authority may order a rehearing on the Charge and its Specification and the sentence, which is conditionally set aside for the purpose of rehearing. If the convening authority determines that a rehearing on the Charge and its Specification is impracticable, he may approve a finding of guilty of the lesser included offense of absence without leave in violation of Article 86, UCMJ, and order a rehearing on the sentence only. If the convening authority determines that a rehearing on the sentence likewise is impracticable, he may reassess the sentence.

Senior Judge CREAN and Senior Judge GRAVELLE concur.

APPENDIX D

Excerpt from p. 255 of the Record of Trial, 7/15/91 Hearing:

MJ[1/]: It just seems to be that maybe we're missing a couple things. First of all, in a specific intent crime it's what's in the mind of the accused, so we're not talking about what's--the reasonableness aspect. We're talking about the honest belief of the accused, I believe, in general, with regards to specific intent crimes.

* * *

p. 258, 7/15/91:

MJ: . . . . for the record, I'll state that at this time I'm going to grant the government's motions, both of them,

p. 266, 7/15/91:

MJ: The intent goes--that we're talking about here, by the way, the specific intent was, first of all, the government has to prove that she quit her unit.

IC[2/]: That's right.

1/ The military judge is denoted as "MJ" in this transcript.

2/ Defense counsel for Captain Huet-Vaughn is denoted as "IC" in this transcript.

MJ: Then they have to prove what the reason was.

IC: That's right.

MJ: And the reasons that--that we're talking about here is, was it to avoid hazardous duty, was it to avoid important duty.

IC: Or was it for some other reason, did she have a different intent that I should be allowed to establish in court. Do you follow me, your honor?

MJ: I----

IC: In other words----

MJ: Exactly.

IC: Okay.

MJ: But what--if it were--if it was because she thought it was legal is not relevant, or that she thought it was illegal. It's not relevant. They still have to prove that--that what the reason was, was one or the other or both of those things.

IC: But still the defense should be able to explain to the court members what her intent really was, and the government must then prove beyond a reasonable doubt that she did not think that she was authorized to absent--absent herself from her unit, and they must prove beyond a reasonable doubt what they say her intent was, and I'm saying that we have a different intent here. We have a different intent that we should be allowed to bring before the court. I mean, as I

understand your motion in limine, in essence you're saying that even the accused cannot take the witness stand and cannot say, "These were my world views; this is why I did this. The reason I did this was for the following reasons, and I did make public statements, and these are the public statements." And so that means that even her state of mind would not be allowed to come before the court members.

* * *

p. 272, 7/15/91:

IC: . . . . But I see the court disagrees with me pertaining to those high-ranking witnesses, but most certainly we should be allowed to present evidence concerning her intent and her honest and reasonable view that she was authorized under international law not to participate.

* * *

p. 273, 7/15/91:

MJ: But in order to get over that first part there's no way of determining whether something is an honest belief unless we hear what the belief is and hear from the accused, it seems to me.

IC: Well, is--in essence are you saying then, your honor, that the accused in this particular case would be required to take the stand first and that then a decision would be made as to whether or not other witnesses could be brought in to substantiate the fact that she had an honest view and the fact that it was honest and reasonable, because----

MJ: Well, I'm just saying that----that unless I know that--I--I mean, I wouldn't get anywhere close to your position unless I knew that she were going to testify and certainly not until after I knew what she were going to testify to, in any event, because you don't get over the first hurdle. You don't get past the greater offense to even get to the lessor offense unless she is going to testify.

IC: But what the government has done is to raise motions to exclude us from being able to raise the very evidence that the court is stating would be necessary for you to be able to make a ruling, and I am representing----

MJ: I don't think that they really did it, in the first place. I think what they asked that she not be able to testify to, is perhaps distinguishable from what you're--what you're saying here today. Because they--they indicated that matters of conscience, morality----

IC: Worldly views. Worldly views.

MJ: ----and things of that nature. Not whether or not your accused wrongfully misunderstood what the law is, which is what--my view of what--what Captain Huet-Vaughn did, and you state it differently. You say, well, her intent to--to show--for us to show what her intent was, which was not these things, which was something else, then I have to be able to--to show what her feelings were in that regard, and I'm not sure that I disagree with you in that regard. But at that point we're talking about just what her--the view of things through her eyes, not through Ramsey Clark's eyes or Professor Boyle's eyes. What's

important is the view of--of the world through her eyes. And some finder of fact would have to decide then whether--if what you're--if somebody buys your --your argument, what they have to decide then is, is the reason she didn't go because she honestly didn't want to take part in this important duty or this hazardous duty, or was it because she honestly thought that she was going to be required to do something illegal?

IC: Well, I think that you have raised a good point in this way, your honor, which is that motions in limine are generally disfavored by the courts and it seems that this whole matter of a motion to exclude my client's testimony before she takes the stand is really inappropriate and, instead, those should be objections on a question-by-question basis made by the government at trial when my client takes the stand and explains her acts, and not a broad motion in limine that she cannot bring in--I mean, there's a statement which is in the Article 32----

MJ: You--what you're telling me is that it's far, far short of what they've asked me to--to limit. You're telling me that she's only going to testify as to what her intent was.

IC: I'm going to say--I'm saying that she's going to testify what her intent was and what she did and, for example, in the Article 32 record there is her statement of January 9th of 1991. Now, I think it would take a philosopher to determine whether one sentence consists of worldly views or--or something else. And I think that that, for example, is a statement that should properly be before the court

members, and that is a statement that is part of the record at this point, of the Article 32 investigation. And that is a statement by her concerning her--why she did what she did, and giving information that she had at the time, which was important to her and pertains to her knowledge and her intent, and it seems crystal clear to me that that sort of evidence is relevant and material to this offense and should be before the triers of fact. But what the government has done in essence is--is attempt here to assert such a broad motion in limine that it's as if that never happened, that she didn't issue a statement in writing on January 9th of 1991, and certainly the trier of fact should be apprised of those matters, and they bear directly to the time frame of the alleged offense, to what she thought, and to what she did and to why she did it. And--and also her statement of February 2d of 1991 when she--when she attended a press conference and surrender rally.

MJ: But what do those have to do with her moral beliefs?

IC: Well, we can take a look, your honor, at--at the--the statement of January 9th and I think that there's very limited relevance pertaining to conscientious objection. I mean, my client is not going to take the stand an say, "I did this because I'm a conscientious objector," and that's not a defense. But it certainly plays a role, if a minor one, concerning her motivations. But the statements of January 9th, for instance, are very explicit in explaining why she's doing what she's doing, and the information that she had and the number of casualties that she expected, based upon her knowledge of the situation, which she obtained from International Physicians for the

Prevention of Nuclear War, the 1985 Nobel prize-winning peace organization that she's been a member of since--since 1980, and of which she has been the head of the Kansas City chapter and the founding member of the Kansas City chapter. So it's--it's an unusual case, no doubt about it. But those are the facts and my client should be able to explain her motivations, her intent, and what she did. And I think that to exclude all of that goes contrary to the case law pertaining to relevance during--shortly before an offense, during an alleged offense, shortly after an offense. And it's all relevant and I don't see how rightfully under law that information could be excluded on the merits, so they have both attempted in these motions to eliminate the expert testimony and the fact testimony of Ramsey Clark and the expert testimony of Professor Boyle and also in essence to--to gag the accused. It's as if she never spoke out. It's as if she never had that intent. It's as if she simply left, she returned, and not let's get on with the sentencing. It's as if it should be verdict first, sentence--verdict first and then we'll have the trial.

* * *

p. 285, 7/15/91:

MJ: My ruling at this time that the intent that the court is dealing with here is whether or not--well, first of all--let--let me begin again. The question is--that the government has to prove is whether the duty was hazardous and/or whether the duty was important. If

the reason for going AWOL or quitting the unit, as is used in this specification, was to avoid this duty, then it makes no difference what her reason for intending to avoid this duty was, except in extenuation and mitigation.

IC: There's one thing that you have forgotten pertaining to another element of the offense, and that is the government must prove beyond a reasonable doubt that my client was not authorized and----

MJ: I understand that.

IC: What we're asking is to have the opportunity to present evidence that in fact my client was authorized and that she thought that she was authorized.

MJ: You're--and--and you're saying that--that it--she would be authorized because the--the war was illegal and she--and so she could be--because--and not do these things because it was illegal, and once again that would be the ruling on it, as a matter of law. And a mistake on her part is at her own peril. I understand that.

IC: Well, but she should be able to defend. I mean, regardless of whether it's at her own peril or not, if she has----

MJ: Not as to a mistake of law.

IC: Well, I'm talking about a mistake of fact and what Professor Boyle testified to was very, very, very explicit that in his view she was authorized and certainly given her public statements that she thought

that she was authorized and had a good-faith belief that she was so authorized.

MJ: Unfortunately for you, Professor Boyle is not the judge in this case.

IC: Well, your honor, we realize that.

* * *

p. 288, 7/15/91

MJ: . . . . Let's suppose--let--let's suppose that the accused said, "My intent wasn't to avoid the hazardous service at all. My intent was that my mother was dying and that--that I had to go and take care of my mother and certain other things." That's not what you're saying. You're saying----

IC: That's saying that----

MJ: ----that her intent was not to--not to take part in this service at all for these reasons.

IC: No. I think that you are mischaracterizing the defense, because in that particular instance, where the person says no, I--I went home and I wanted to go home and that is the reason why I avoided hazardous duty was because I wanted to go home, that person--or that I thought I was authorized to go home, I thought I'd been discharged from the service, and that's why I left and went home, I thought I was authorized, that that certainly raises a defense and that is allowable under law. The person--I mean, my

client does not state that she intended to avoid hazardous duty; that is, a duty which is hazardous.

MJ: Your client hasn't stated anything. I keep--I want to keep bringing that to your attention.

IC: Well, my client has stated something, I mean it's in the January 9th, 1991, statement which is in the Article 32, that report of investigation, and which is alluded to in--in Professor Boyle's testimony and Ramsey Clark's testimony, too. She's said a lot. There are also articles in the Article 32 investigation of what my client has said to the press.

MJ: But you're--but I'm--all I'm saying to you is that that's not going to be admissible in evidence if your client is not going to testify on the stand as to what her intentions were and subject herself to cross-examination.

IC: But I--but as I----

MJ: In any event----

IC: You're saying--you're--oh, well, those are evidentiary matters?

MJ: Yes.

IC: All right. Those are matters pertaining to whether or not I can introduce the statement, whether or not I can have somebody else say, "I was there and I heard this statement, here it is." All right, those are evidentiary questions.

MJ: Yes.

IC: But what I'm saying is that the government has just raised a motion in limine in which all her worldly views are excluded from the trial.

MJ: No, they're not.

IC: All right.

MJ: They're excluded----

IC: Well, I'm glad to hear that.

MJ: ----on the merits.

IC: I want to know what is and what's not.

MJ: On the merits.

IC: Well, that's what I mean, on the merits. That is on the merits. If she cannot----

MJ: Well, if she--if she's going to--if she takes the stand and says, "I chose not to take part and that's the reason I went--that I absented myself," all that comes after that has to do with the legality of whether her--her beliefs were founded or unfounded and what I just said is that then that does not become relevant until sentencing.

IC: Well, your honor, I--I--I ask that appellate defense counsel to put a red star at the bottom of this page, because it seems clear----

MJ: You'll have the first opportunity.

IC: It seems clear, your honor, that in this case you are denying us a defense.

* * *

p. 293, 7/15/91:

MJ: . . . . The point is, was the duty hazardous, was it important, did she know of it? And for whatever her reasons were is the reason she went AWOL to avoid those.

* * *

Record of Trial p. 318, 8/5/91 Hearing:

IC (MR. WEST): All right. Well, generally, I'm--I'm not sure by your rulings in the motion in limine just what the status of these--the matters of evidence are in the case. I understand that these--these motions were raised by the government and they were granted by the court with, I would think, with certain--initially, I should state that the government's motions were to restrict this evidence both on the merits and in-in mitigation, if I'm not mistaken, by the plain language of the written motions. But on the hearings, both the government and the--yourself, your honor, took the position that most of this evidence would be relevant, certainly, on litigation [sic] and extenuation, which I understood them to be. Now if that's--if that's not correct, then I'll address some of that. If it's--if it--if I am correct in that, we can pass--sort of pass on the issue of mitigation. Because there is just replete instances in the transcript on--on the motion--motions

in limine that they were--that this evidence would be admissible in mitigation. I haven't cited those to the court's attention, but I'm sure that the court is in possession of that transcript on the motion in limine. And I don't think there's any contest at all as to the fact that this court was ruling that this--that this evidence would be admissible at least in mitigation. Am I correct?

MJ: Well, I--I certainly didn't indicate that I would require the government to call all of these witnesses that were requested. What I did say, and if--if I was misleading, I'm sorry. But I said that with regard to Captain Huet-Vaughn's beliefs, and so forth----

IC (MR WEST): World views.

MJ: Exactly. That she certainly would be at liberty to present those to the court in extenuation and mitigation, in explaining why she did what she did, and felt compelled to do what she did, I'm sure. On the other hand, almost every one of the ones that are left, I'm not sure what their world views will--will lend to this.

IC (MR. WEST) I'm not talking so much about world views, your honor. I am mentioning world views, of course. But I'm also mentioning the fact that the--the witnesses like Francis Boyle and some of those people, their testimony would not be admissible on the merits as you stated, but it would be admissible in mitigation. And those statements are in the record. I--I'm not trying to----

MJ: That's--that's not my ruling.

IC (MR. WEST): Well, we will have to--I didn't bring a copy, my copy of the--of the--of the transcript in regard to the motion in limine, but I have it back in my hotel room. And I--I believe that--that that--that you could possibly be incorrect in that. I'm not saying that you are, I'm just saying I believe, because I--I did read that thing most recently. And it looked like to me that everyone was of the opinion that all of this evidence would be admissible on mitigation but not on--on the merits.

MJ: That's not my ruling.

IC (MR WEST): So that is not your ruling, is that----

MJ: So if--if it's--if that's what--what you were led to believe, then I misled you.

IC (MR WEST): Just a minute. And if you would look on page 12 of my motion. On your specific ruling there, I--I quote you on page 285 and 286 of the--of the motion in limine. Your honor, do you see the paragraph there, the question is, this is quoting your--your testimony--I mean quoting your ruling, I believe, "... that the government has to prove is whether the duty was hazardous and/or whether the duty was important. If the reason for going AWOL or quitting the unit, as is used in this specification, was to the avoid this duty, then it makes no difference what her reason for intending to avoid this duty was, except in extenuation and mitigation."

MJ: Yes.

IC: (MR WEST): And you're standing by that rule?

MJ: I'm saying that clearly Captain Huet-Vaughn will have the opportunity to make a--to make a sworn or an unsworn testimony explaining what her beliefs were, and what her feeling were, and why she did what she did. But, that--that in no way supports your position that what I said was that I'm going to require the government to bring how many ever of these witnesses there were.

IC (MR WEST): Your honor, I haven't stated that it was my belief that the government should be required to bring all these in. I'm just stating that our witnesses----

MJ: In fact, I ruled that they would not have to.

IC (MR WEST): Yes, sir, I did understand that. And--but your ruling here as to her reason for going AWOL, her intent for going AWOL is a very detailed reason. And the evidence, you ruled on page, I think, 295 of this transcript that you have in front of you, that she could present that in--on the merits, of course, as well as in mitigation, as I understood your ruling there on page 295. Again, I--I apologize to the court, I didn't bring my copy of this.

[Mr. Font handed a copy of the transcript to Mr. West.]

IC (MR WEST): I've been handed a copy. I'm--I'm referring, your honor, to the "Well, it's an interlocutory question. It'll be raised before me. But at this point, the motion is denied. I'll allow Captain Huet-Vaughn, subject to objection, to tell what her--what her intentions were, if you feel that that's appropriate at any given time." And as I understand that, that would include--certainly include the merits

of the case, because she is charged with a specific intent crime. Am I correct?

MJ: That's correct. That's correct.

IC (MR WEST): All right. And to what her intent was when she went AWOL, I would suppose that that would include her right to testify to that and to present evidence to support that intent, what her intent was. And we have that evidence available, pretty much, as to what her intent was, and her intent was not to avoid hazardous duty or important service, but her intent was to expose what she felt were impending war crimes in the Persian Gulf and to expose that to the American people, to the Congress, to the United Nations, talk shows, et cetera, et cetera. That was her intent; that was the reason why this lady actually went AWOL.

* * *

p. 331, 8/5/91:

MJ: Let me interrupt you for just a second here. I'm not sure--I'm--I'm not going to limit what Captain Huet-Vaughn is going to tell the court about herself at all.

IC (MR WEST): I understand that, your honor.

MJ: So I mean, none of--I mean--and I don't think that the government is asking that to be limited either.

* * *

P. 363, 8/5/91:

MJ: Very well. And with regard to Bishop Thomas Gumbleton which is 1 in your belief, your request is denied. With regard to Lieutenant Colonel David A. Russell, which is 2 in your belief, your request is denied. To be perfectly honest with you, with regard to Special Agent Larry Wayne Gann, you've indicated that he took a statement from a certain lieutenant colonel, but I have no way of knowing from what you have here why that would be relevant to these proceedings. I don't know what that's about. I can't tell from what you've set forth here.

IC (MR WEST): It would only be as to the content of that statement, in the event we needed him for impeachment purposes, your honor, of Colonel----

MJ: Abshier?

IC (MR WEST): Abshier. Yes.

MJ: And--I don't--but see my problem is I don't know what Colonel Abshier said in his statement.

IC (MR WEST): I believe his----

MJ: I don't even know what--what it's about.

IC (MR WEST): Didn't--did Abshier testify at the Article 32?

MJ: Well----

IC (MR WEST): Oh, he had a sworn statement.

MJ: All right. And I--I don't--I don't recall what that was all about. So if you--you want to help me on that?

IC (MR WEST): Mr. Font.

AIC[3] (MR FONT): Your honor, Lieutenant Colonel Abshier gave us a sworn statement in which he discussed a conversation he had with the accused on or about 29 December of 1990, and during which time the accused informed him that she felt that the Persian Gulf conflict was immoral.

MJ: Is Colonel Abshier being called as a witness?

TC[4]: He is, sir. And he will be testifying that the accused expressed interest in--in not going. But he will not be testifying as to the testimony that you've already said is inadmissible; for instance, her personal views of the gulf war and whatnot.

MJ: Very well. But, now, what is it that you feel that Gann would be able to say in regard to the statement taken?

AIC (MR FONT): Your honor, he would verify that that is the statement that was taken.

MJ: Okay. But that'll only be a problem if Gann says that it was--that wasn't his statement. And Gann's going to be here, so you--you're going to have the

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[3] Additional defense counsel for Captain Huet-Vaughn is denoted as "AIC" in the transcript.

[4] Counsel for the prosecution is denoted as "TC" in the transcript.

opportunity to cross-examine Gann in any event. I mean----

DC: Sir, I believe you meant Colonel Abshier.

MJ: Excuse me. Abshier. Colonel Abshier is. So at least at this point it doesn't seem that that would be necessary. So I'll--I'll hold any ruling on that in abeyance. Is he on the fort?

TC: No, sir, he's in Korea.

MJ: Now it's my understanding that with regard to Captain Schneider, that the government is bringing that witness. Is that correct?

IC (MR WEST): Is that number 4, your honor?

MJ: That's number 4. Is that correct?

TC: That's correct, sir.

MJ: With regard to number 5, which is Representative Henry B. Gonzalez, your request is denied. And with regard to Sergeant Ann Marie Matakas, your request is granted. With regard to Specialist Barbara Kelsey, which--that's 6, previous one--which is 7, your request is granted. With regard to number 8, which is Professor James Thompson, your request is denied. With regard to number 9, which is Under Secretary General Martti--I'm not sure how you pronounce that, A-H-T-I-S-A-A-R-I?

AIC (MR FONT): It's Ahtisaari, your honor.

MJ: Ahtisaari, your request is denied. With regard to number 10, which is Megan Elizabeth Passey, M.D., your request is denied. With regard to number 11, which is Howard Levy, M.D., your request is denied. With regard to number 12, which is Charles Clements, M.D., your request is denied. With regard to number 13, which is Gordon Livingston, M.D., your request is denied. With regard to number 14, who is Margot Kidder, an actress, your request is denied. With regard to number 15, who is Thomas Fox, your request is denied. With regard to number 16, the Reverend Sam Mann, your request is denied. With regard to 17, who is the Reverend Mac Charles Jones, your request is denied. With regard to number 18, which is the Reverend Jessie Jackson, Senior, your request is denied. With regard to number 19, which is a Professor Telford Taylor from Columbia University, your request is denied. With regard to number 20, who is Ambassador Miguel Marin Borosh--Borsh?

ACCUSED: Miguel Marin Borsch.

MJ: Okay. Your request is denied. With regard to number 21, who is Minister Zadalinda Gonzalez, your request is denied. With regard to number 22, who is Daniel Ellsberg, your request is denied. With regard to number 23, which is Victor W. Sidel, medical doctor, your request is denied. Is Colonel Berger on post?

TC: Yes, sir, he is.

MJ: Seems to me that his--his testimony would be relevant in extenuation and mitigation, if it comes to that.

TC: Pertaining to her conscientious objector status, not the reasonableness of her views, sir?

MJ: Well, pertaining to his belief in the sincerity of the--I mean, as to the sincerity of her beliefs. I think that's relevant with regard to sentencing. As I understand, and--and all I can go on is what you've offered in your brief. Once again, while I respect Professor Boyle's views, you have indicated that you--you're not going to hold out any longer, as Mr. Font did, that her act--that--that she had authority not to be here. And as I--as I--as I understand the testimony that he set forth, that he was saying that in his view, she did have authority.

IC (MR WEST): Yes, sir. We're not going to submit that portion of his testimony. But we are advancing or submitting his testimony as to the overall war crime nature of the Persian Gulf operation, which we feel supports Captain Vaughn's specific--what she says was her specific intent at the time she absented herself.

MJ: And--and I'll deny that request. That's number 25. Number 26 is Ramsey Clark, and you've indicated that he couldn't be present. And I guess you don't want him subpoenaed as such in any event.

IC (MR WEST): Sir?

MJ: Ramsey Clark. I think you indicated to me that he couldn't be here, and I guess you're not--you--you were just asking that his 32 testimony, I think, be admitted with----

IC (MR WEST): Yes, sir. Since we can't get him.

MJ: I--I don't feel----

IC (MR WEST): Sir?

MJ: I--I do not feel that that's relevant.

IC (MR WEST): What is that, his 32 testimony?

MJ: Correct.

IC (MR WEST): Any of it?

MJ: Well, certainly--I--no, I really don't. With regard to 27, who is Professor John M. Swomley, your request is denied. With regard to 28, which is General Colin Powell, your request is denied. And 29 thru 36 are General Schwarzkopf, Secretary Cheney, Secretary Stone, Secretary Rice, Secretary Baker, Former President Reagan, Former Secretary of the Navy Webb, and General Michael Dugan. Those requests are all denied. Number 37 is Bernard Lown, L-O-W-N, medical doctor; that request is denied. Number 38 is Daniel T. Young, medical doctor, that request if denied. Colonel Auer is present and--and will be made available. Is that correct?

TC: Yes, sir.

MJ: Colonel Copeland--that's 39; 40 is Colonel Copeland, that is granted as well. I'm--I'm not sure that I understand or--and as such agree with number 41. However, Colonel Rosenblatt is present and if

necessary he can be made available. He will be here throughout the week, will he not?

TC: Yes, sir, he will. Sir, as to--there's two 41's listed. That's Colonel Rosenblatt; in our response we termed 41a.

MJ: Yes.

TC: Also, 41b then would be Colonel Pilar Juan Franco; I believe that's the accused's aunt. We've made contact with her, and she's already been subpoenaed to testify in another trial on Wednesday and Thursday of this week and said she would be unavailable to come back from Germany.

MJ: Well, I don't know how we can deal with that.

TC: Perhaps we can arrange some stipulation of expected testimony or something of that nature?

MJ: Well, I'll let you take that up with the defense counsel. I'll hold that one in abeyance, 41, then. Be sure to remind me of the two if they become a problem, if they can't be worked out that so far we haven't ruled on. With regard to 42, which is Representative Charles Rangel, your request is denied. With regard to number 43, which is Colonel Abshier, your request is granted. With regard to 44, which is President Jimmy Carter, your request is denied. With regard to number 45, which is Captain---

DC: Your honor, it is our understanding that Captain Borserine has been requested by the government and will be present.

MJ: That's granted. With regard to Sister Mary McNellis, your request is denied.

IC (MR WEST): What--which number is that, judge?

MJ: 46. With regard to 47, it's my understanding that the--the government concurs with you there, and that she will be made available.

TC: Yes, sir.

IC (MR WEST): Who is that, your honor?

MJ: That's Connie Lynn Borserine. With regard to 48, that's Lydia Moore, medical doctor, that one is granted. With regard to 49, it's Karen E. Navarro. Are you in contact with that witness?

TC: No, sir. I don't believe we've made contact with this particular witness. But the government would contend that this witness, if called to testify as to honesty and truthfulness, that that's cumulative with the three or four other witnesses that have already been called to testify as to honesty and truthfulness, and that the remainder of her testimony, likewise, but would be cumulative. But primarily they submit she's being called simply as a character witness for truthfulness.

MJ: Has the defense been in contact with her recently?

AIC (MR FONT): We have been in contact with her, your honor. She would testify to a number of different matters that are listed here, including work with the accused in interface--Interfaith Peace Alliance in

Kansas City, and lobbying for a nuclear test ban. I wish to call her for all those reasons. And we can certainly cooperate with the government, making sure that she is contacted in this case and comes to testify.

MJ: As I read your offer, I don't see--well, I would allow her to testify as to her reputation for honesty and integrity on the merits. And with regard to the--what she knows of the accused personally, on the--on the other issue in extenuation and mitigation, I'll allow her.

* * *

p. 388, 8/5/91:

IC (MR WEST): But I--I think you've cut us out of--of the witnesses that would support her specific intent, the ones that she discussed her intent, some of whom she discussed before she left even what she--why she was leaving. And I think case law supports the introduction of that testimony. And some of whom she talked with while she was gone, case law supports the introduction of that testimony as to the issue of her specific intent. And I think if you----

MJ: You see but you--you weren't--once again, you weren't here and--before my ruling before. And certainly if the case goes to appeal, you and what other legal scholars are at your disposal will have the ability to disagree with me. But my ruling is that once it's shown, and if it is shown, that the duty was hazardous and/or important, and she intentionally did not go, her reasons for not going, with regard to what you set forth in this brief, are mistakes with regard to

her view as to what the law--she believed--what you're telling me and what's been held out to this court is that she believes that she was legally entitled not to go.

IC (MR WEST): Oh, no, sir. Not saying that. Not saying that at all. We're saying what her specific intent was at the time she left, and that is very much a legal issue in----

MJ: That's right, it's a legal issue and I've ruled interlocutorally that even given what she's saying to be the truth, the fact that she intended not to go, knowing what the duty was, that's--that's--the crime ----

IC (MR WEST): That forecloses----

MJ: ----is consummated.

IC (MR WEST): You see, and I think the case law which we cited refutes that position, your honor. The Court of Military Appeals, the Cothern case, they ruled that you can't obliterate that element of the offense. The specific intent element can be litigated, and you can't obliterate it just by proving the established facts, the other established facts in the case that relate to the other elements of the case, i.e. that she did absent herself without authority, i.e. that the duty in the Persian Gulf was hazardous and important. You can't just litigate this case just by proving those established facts and jumping over the issue.

MJ: The--I'm not saying that. I'm saying that if her

intention was to avoid that service and that's proved, period.

IC (MR WEST): Oh, yes, sir.

MJ: The reasons--the reasons that you're--you're setting forth, they don't----

IC (MR WEST): Your honor----

MJ: They don't help you--they don't help your case one bit. They're not even relevant.

IC (MR WEST): What you're saying is, if her intent is proven, that that was the reason why she absented herself, with the intent to avoid that duty, but that's the whole issue of the case. We're saying that her intent was not to avoid that duty and not to avoid hazardous duty.

MJ: I disagree with you.

* * *

p. 395, 8/5/91:

MJ: I'm--I'm--let me--let me assure you of one thing. I'm steadfast in that position. And we'll find out on appeal.

IC (MR WEST): Oh, yes, sir. I understand that. I'm just trying to prevail upon you at this time to change that ruling and--and to open it up.

MJ: I've--I've considered it now twice and----

IC (MR WEST): Because it pretty much strips her. I mean you're making her--you're--you're just taking away the guts of her defense when you do that. And I----

MJ: You know, I'm interested in, you know, you're--you've cited one--one case and it talks about intent. but with regard to the specifics of this kind of crime, where they have been--where the question has been addressed by the Court of Military Appeals and the Court of Military Review, the authority doesn't support you and, I mean, for an hour and a half, I understand and heard your very eloquent presentation this morning. But we don't have, you know, a shred of support, legal support, for your position. It specifically addressed what you're--what you would have the court to--to consider in the cases and in the Manual and it says that that is not a defense.

IC (MR WEST): Well, you know, as you stated, it's an appellate issue, of course. But we do respectfully disagree and I, but that's beside the point. I mean, we disagree, obviously, but I--I think by all that is right and just, this lady should be able to present why she went AWOL. She should be able to testify what her----

MJ: And she will.

IC (MR WEST): ----what her intent was at the time she went AWOL.

MJ: And--and she will.

IC (MR WEST): And she should be able to present witnesses that corroborate that intent. And those are

the ones that we've called. And they are specifically Doctor Clements, Doctor Sidel, Lieutenant Colonel Abshier, which you've granted, Colonel Rosenblatt, which you've granted, Sister Mary McNellis, which you've denied. Those are the people that she talked with before she left. And then you have denied again some of the same people, Doctor Clements, Doctor Sidel, Howard Levy, Margo--Margot Kidder, the movie actress, Professor Swomley, Doctor Lown, and Sister Mary again.

MJ: I'm--I'm prepared to proceed.

IC (MR WEST): Those are people that she talked with----

MJ: Let's--let's proceed to a new issue. My ruling stands.

* * *

p. 398, 8/15/91:

IC (MR WEST): Okay, I think that would get it. We are asking for witnesses that would testify as to her intent and as to the documents which would support and corroborate her intent. And I believe that that's covered what we were requesting, because your specifically denying us the documents that we requested.

* * *

p. 499, 8/5/91

MJ: To clarify them and so you would know exactly what my position is, which apparently was not clear to you.

The litigation that we so laboriously went through had to do with the element of the offense that is as follows: That the accused did so with intent to avoid hazardous duty and/or to shirk important service; namely, deployment to Southwest Asia in support of Operation Desert Shield. At issue is whether the accused consciously, intentionally quit her unit so she would not have to perform this hazardous duty and/or important service. To consciously, intentionally quit one's unit to avoid hazardous duty and/or important service because of one's conscience, religion, or personal philosophies is not a defense. Testimony on the merits of this case relating to such contentions is therefore irrelevant, and timely objections made by the prosecution to questions eliciting such testimony will be sustained. Likewise, to consciously, intentionally quit one's unit to avoid hazardous duty and/or important service because of one's belief that she may be asked to become a principal in an--in an illegal act, i.e. a war crime, is speculative and is likewise not a defense. Testimony on the merits of this case relating to such contentions is therefore irrelevant, and timely objections made by the prosecution to questions eliciting such testimony will be sustained. I think that makes my position absolutely clear.

IC (MR WEST): Well, not as to everything that was--all of the legal issues that we discussed in chambers yesterday. You haven't touched on some of them. And one of them was that this lady, this defendant, could not even introduce proof of the reasons that sustained her intent at the time she left her military duty. She couldn't introduce that on the merits or in mitigation as I--am I correct on that?

MJ: I didn't say that. I just--I think what I just said is absolutely clear.

IC (MR WEST): Well, is it clear then that she can introduce evidence that supports her--corroborates her intent and her reasons for her intent in mitigation and extenuation?

MJ: Yes. She can explain the matters of conscience--of her conscience and of her philosophies.

IC (MR WEST): As to war crimes?

MJ: Yes.

IC (MR WEST): And--and will she be able to introduce evidence that supports----

MJ: The witnesses that I've denied are still denied on the merits or in extenuation and mitigation.

IC (MR WEST): Well--but we have testimony that supports her intent, her reasons.

MJ: We are not going to litigate whether this is a legal or an illegal war.

IC (MR WEST): I understand that. We wish to litigate the question of her intent. And do you say that she can testify as to her intent herself, but she cannot introduce evidence that corroborates that intent?

MJ: I have said, and can say it again, and I'm perfectly clear in this. I don't know how I can be any clearer.

The witnesses that you asked for that I denied are denied for either purpose.

IC (MR WEST): Your honor, you denied them for subpoena. We have submitted to this court that they ----

MJ: I do not--my ruling is that--that they will not be called for any purpose.

IC (MR WEST): Yes, sir. But they are coming----

MJ: I can't be any clearer than that.

IC (MR WEST): Yes, sir. I understand that. But I wish for the record to note that despite the fact that the government and yourself has refused subpoenas for this--these witnesses, the great majority of them have volunteered to come and will be here anyway, without subpoena. But it seems to me that we can certainly introduce evidence to support this and corroborate this lady's intent and reasons for going AWOL.

* * *

From Record of Trial, p. 570, voir-dire of court members 8/6/91:

MJ: Let me stop you again here. I'll instruct the court at this time that, as a matter of law, one who consciously and intentionally quits one's unit to avoid hazardous duty and/or important duty because of one's conscious--conscience, religion, or personal philosophies, that is not a defense.

MEMBER (COL MIKOLASHEK): That's right.

MJ: I instruct you that as a matter of law. Does anybody have a problem with that?
[Negative response by the court members.]

MJ: I will likewise instruct you that a person who consciously and intentionally quits one's unit to avoid hazardous duty and/or important service because of one's belief that she may be asked to become a principal in an illegal act, i.e. a war crime, is speculative and is not a defense. Does anyone have any problem with that instruction?
[Negative response by the court members.]

* * *

p. 598, 8/6/91:

IC (MR WEST): Now, on the question of specific intent, do you understand that must be proven beyond a reasonable doubt----

MEMBER (LTC MOAKLER): Yes, sir.

IC (MR WEST): ----by the government, and that it can involve circumstantial evidence or direct evidence?

MEMBER (LTC MOAKLER): Yes, sir.

IC (MR WEST): And that specific intent is the intent--specific intent to avoid hazardous duty or important service; so you understand that?

MEMBER (LTC MOAKLER): As guided by the military judge, yes.

* * *

p. 603, 8/6/91:

IC (MR WEST): Do you understand that other soldiers, officers and enlisted men, could have matters of conscience that might differ from your own?

MEMBER (LTC MOAKLER): Yes, I do.

IC (MR WEST): Pertaining to matters military?

MEMBER (LTC MOAKLER): Yes.

IC (MR WEST): Are you willing to consider those matters in--in this case?

MEMBER (LTC MOAKLER): Yes, I am.

IC (MR WEST): Both on the merits and on the sentence?

MJ: I--don't answer that question. I've already instructed them that matters as to conscience are not to be considered on the merits.

* * *

p. 713, 8/6/91, opening statement:

IC (MR WEST): Her specific intent on leaving was not to avoid hazardous duty. We'll show that this lady has been involved in hazardous duty in one shape or form

or other in the United States for a good many years. This was a lady of conscience; that was not her specific intent. Now, just what her specific intent was, I've been restricted from making statements as to what that specific intent was. I cannot tell you. But, in any event, she will testify and she will be asked to explain what her specific intent was. And if that objection is sustained, if there is an objection on that question and if it is sustained, you will not hear from her what her specific intent was. In other words, we might not well be permitted to introduce our evidence from our side as to the circumstances of what her specific intent was. In any event, she will be on the witness stand and she will be there ready, willing, and able to tell you what it was. And we will be ready, willing, and able to call other witnesses on that same issue, if permitted to do so.

* * *

p. 716, 8/6/91:

IC (MR WEST): . . . . We maintain that we will prove to you, if permitted to do so, that this lady's specific intent in refusing to go to the Persian Gulf was not for the purpose of avoiding hazardous duty or shirking important service. It's other purposes, which we will prove if permitted to do so. We submit the lesser included offense of AWOL is far more appropriate than the finding of desertion in this case and we hope that upon the conclusion of this case that you gentlemen will agree and reach that verdict in this case. And I thank you very much for your patience and your attention. Thank you.

MJ: I'll comment briefly on the opening statement, because the references kind of leave you dangling as to what it is that I've ruled and--and what it is that you will or will not be able to consider, depending on what the objections are by counsel. The element in question that's been referred to by Mr. West on various occasions is that the accused did so--that is, to--the first element is that she quit her unit. The second element is the one that's--that's in--that he's been talking about all along. And the element is that the accused did so with intent to avoid hazardous duty and/or to shirk important service; namely, deployment to Southwest Asia in support of Operation Desert Shield. At issue is whether the accused consciously, intentionally quit her unit so she would not have to perform these duties. To consciously, intentionally quit one's unit to avoid hazardous duty and/or important service because of one's conscious--excuse me--conscience, religion, or personal philosophies is not a defense. It may be a motive, but it is not a defense. And therefore what I've indicated to Mr. West and I think what he understands is that timely decisions with regard to those things, I will sustain objections to, because they're not relevant. The question is whether she consciously, intentionally quit her unit so she wouldn't have to perform the duties. And I'll explain the rest of the elements later.

IC (MR WEST): Your honor, I'm going to object to that instruction.

* * *

Excerpt from p. 753 of the Record of Trial, 8/7/91:

IC (MR WEST): I show you Defense Exhibit A for identification, which purports to be a--a statement that you gave, I believe, to the CID, is that correct Colonel Abshier?

* * *

COLONEL ABSHIER: That's correct.

Q. All right. Now, may I have that statement, sir. Well, first, I marked in the margin here a segment. And I wish you to read that to yourself, what's written--have you read it?

A. Yes.

Q. Is that what she told you?

A. Yes.

Q. Okay. All right. Now, I'm going to read from your --Defense Exhibit A for identification, which is your statement. I'm going to ask you if this is correct.

MJ: Just ask--ask the question as to--ask what it is that you're wanting to know.

IC (MR WEST): Yes, sir.

MJ: I'm not--I'm directing you not to read his statement.

IC (MR WEST): I'm not going to read. I'll----

Q. Did Captain Huet-Vaughn on that morning tell you that she was not going to leave and that she did not support Operation Desert Shield because it was an immoral conflict and her conscience would not allow her to support the operation?

TC: Objection, your honor.

MJ: I'll allow that question.

A. That's correct.

* * *

p. 859, 8/7/91:

Q. It's hearsay. But you didn't find out any more hearsay about the conditions under which Iraqui doctors operated?

COLONEL COPPLE: No, I didn't ask.

Q. After the----

A. No.

Q. ----air war started?

A. No.

Q. Doctor, what effect would the destruction of Iraqi water companies, water purification plants, sewage treatment plants, and electrical plants, for example----

TC: Objection, your honor. Relevancy.

MJ: Sustained.

IC (MR WEST: I didn't finish my question, your honor.

MJ: It's sustained.

IC (MR WEST): Sustained. Okay, thank you very much.

MJ: Do you have any further questions?

TC: No, sir.

* * *

p. 920, 8/7/91

Q. What was the subject of that other hearing?

TC: Objection, your honor. He's going to get into areas that you ruled are inadmissible.

MJ: Well, I'll let--I'll let him tell what the--what the subject of that hearing was.

TC: Okay.

Q. What was the subject of that hearing?

[CAPTAIN MINGS:] It was a conscientious objector hearing.

Q. That relates to the woman's sincerity, doesn't it?

MJ: I'm not going to allow you to go into that.

* * *

p. 932, 8/7/91:

IC (MR WEST): Your honor, Captain Huet-Vaughn at this time would respectfully move the court to--for a finding of not guilty of the charge of desertion with intent to avoid hazardous duty or important service, on the grounds that we feel that the United States has submitted proof as to every element of that offense, except with regard to the proof as to her intent. There's been no testimony, circumstantial or direct, that by her absence she intended to avoid hazardous duty or to shirk important service of the United States. We feel that case law, the Cothern case and the type of cases that we cited in our brief to you that's previously been submitted, establishes that that offense is a specific intent crime and that the proof of the other elements alone, standing alone or in conjunction with each other, does not constitute proof of intent. And that's what the government has done today. They have proved everything except the intent of this lady to avoid hazardous duty or important service, and the fact that there was hazardous duty over there, that it was important, is quite immaterial. That's one of the elements of the crime, too. That's one of the elements of the offense that is was in fact hazardous duty, it was in fact important service. But that's a separate element of the crime of desertion with intent to avoid hazardous duty and/or important service. It's a separate element. And, in this case, proof of those separate elements does not, as a matter of law, constitute proof of her specific intent.

* * *

p. 1026, 8/7/91:

CAPT. HUET-VAUGHN: . . . . Back in the 1980's, trying to organize something of this nature, I mean, I got tomatoes literally almost thrown at me at a medical staff meeting. I was called a Russian sympathizer, Commie pinko, a variety of things, just because I was talking about eliminating a nuclear threat for--for--in--in our world. And when--when I would--in the course of--one day just by accident I happened to mention that I was in the reserves--in the Army reserves and that, you know, I--I love this country as much as anyone else, and automatically it was as though the person who had been accusing me of all these things sort of halted and had to--had to rethink the paradigm he was--he was listening to me from and it made an impact and people tended not to necessarily just react on--on a prejudiced perspective. So they--they listened better. So it--it was a more effective way of dealing with folks, I felt.

Q. (I.C.) And so you felt that--that an officer in the reserve is one who gets some--some respect, is that right?

A. Right. And also an officer in the reserve is one who is showing that they--that they serve their country and, you know, and that, to--to many people within the public provided credibility and provided at least the respect of listening to that person's perspective.

* * *

p. 1028, 8/7/91:

Q. (I.C.): All right. What motivated you to rejoin the Army reserve?

CAPT. HUET-VAUGHN: Well, there were several things. Public service was--was a major component and--and the ability to be effective in--in trying to do public service, and also the--the fact that the Cold War had ended and that it looked as though I could be effective also working within--within my community as a--as a nuclear activist--anti-nuclear activist. Also because the Cold War had ended, also I--I felt that it --and because I had finished having my family and because my practice was stable, this was a time when --when things seemed to jell as far as my being able to handle another responsibility and I--I had always had in the back of my mind the fact that I had in fact committed to a 7-year commitment and had only served 5 of those years. So I felt that this was an opportune time for me to--to--to go and do those--those--to provide back that time that I had said I would do. It was a good time. I could--I could return, you know, fulfill that obligation. I paid back all my student loans, all my school loans, everything finally, my loans from the practice, and this was the one--the last thing that I felt morally obligated to--to complete. And, at the same time, I would be gaining something in return, which for me was a very important thing, the fact that I could continue doing community work and public service work and--and also be more--more effective in that.

p. 1045, 8/7/91:

Q. (I.C.): No. Did you think Saddam Hussein was going to pack his troops up and say, "We're leaving"?

CAPT. HUET-VAUGHN: I think--I--I was of the opinion that he probably would have done that with the--the countries of the world united morally against him and sanctioning him economically. Yes, I was, that eventually we would succeed without gambling human lives, civilian lives, American troop lives, or environmental consequence.

p. 1064, 8/7/91:

Q. (I.C.): Anyway, you ended up at Fort Riley?

CAPT. HUET-VAUGHN: Right. I did.

Q. Now, you were having reservations at this time about going through with your orders, or what you anticipated would be your orders, to move to the Persian Gulf, were you not?

A. I was having reservations at this time, very strong reservations, about providing any support to Operation Desert Shield, whether it be in the Persian Gulf, whether it be in Europe, or whether it be stateside.

Q. And would you tèll-tell us how you came to that conclusion, or how you came to that--that reservation and when, and if that reservation was a mounting thing? Tell us how that mounted up.

TC: Objection, your honor. That's getting to what you've said is inadmissible in a roundabout way.

IC (MR WEST): That's the most direct way I know how. I don't how else to present this testimony.

MJ: Well, if what you're trying to get from her is what her--her moral approach was to this, her religious approach, and her personal philosophies with regard to what was going on, I've already explained to the court and--and to you that those are in no way a defense to this, and therefore they're not relevant. And on such objection, if that's what she begins to tell me, I'm going to sustain the objection.

IC (MR WEST): All right. Fine. I'm offering this primarily, right now, as a chronology of events to show how this lady became concerned to the point where she wouldn't go. Now, if she treads on the forbidden area----

MJ: She can--you can----

IC (MR WEST): ----I'll try to steer her away from it.

MJ: I mean, you know, she can say, "I began to have moral reservations." We're not going to get into what those were and why.

IC (MR WEST): We don't have to.

MJ: Okay. Just ask her if she began to have moral reservations.

Q. All right. Tell us what you were doing, ma'am.

A. Well, I began to be--I guess, moral reservations, as--as you put it, and also reservations regarding medical --my role as a physician and my--and the ethics of what I was doing as a physician. I learned a great deal in that last month from a number of--of other, what I consider very learned, groups, like the International Physicians for the Prevention of Nuclear War, like Physicians for Social Responsibility, about the projected civilian casualties that----

TC: Objection, your honor.

MJ: Sustained.

Q. Go ahead.

A. Okay.

Q. Don't tell us what you learned about civilian casualties.

A. Fine. I learned a great deal about an environmental disaster that was----

TC: Objection, your honor.

MJ: Sustained. I--I think what--here, generally speaking, what--what the witness is--is telling us is that she learned things about what may have happened in the war which----

IC (MR WEST): Right, which----

MJ: ----which affected her personal philosophy.

IC (MR WEST): Might--or might, which affected her decisions, yes, sir.

A. And which affected my intent.

Q. All right. Go ahead.

A. And I put the data that I had gathered together, still doubting, I guess--still hoping, I guess, would be the word, or not believing that the information I had gathered that had--that if--if the administration knew the information that I had gathered, which I was hoping they did, that they would not be willing to--to gamble all of the catastrophic consequences that I saw occurring if--if we proceeded to war. When then things mounted and--and basically I learned that, while I was at Fort Leonard Wood, that we had mobilized the civilian blood supply, I----

TC: Objection, your honor. All this is going again to the thought processes that ultimately are going to lead to the conclusion that she drew.

IC (MR WEST): Again, it's very general, your honor.

MJ: I think that's very specific, as a matter of fact, but--but I think we can--you can ask a general question and--and she can get through this, but, I mean, did she--she became aware of a lot of things that affected her moral--I mean, for her to say, "I--I came to some moral conclusions, some philosophical conclusions, some ethical conclusions, and so forth, and I--and I took certain actions based on those."

Q. All right, would you continue then? You heard the judge's admonition.

MJ: You--we're not just into the specifics of----

A. I'll--I--can I talk about medical ethics? Is that okay, or is that not okay, in specific----

MJ: Well, not--not in specifics.

A. Okay. Well, then, I'll be--I came--with the data that I gathered with the concerns that I had that were ethical, moral, also based on--on my--the oath that I had taken as a physician and also the oath that I had taken as--as a military person, I felt that something more was required of me than to just proceed without--without attempting to--without attempting to --to expose what I saw at that point as--as a move to a catastrophic consequence.

TC: Objection, your honor.

MJ: I'll--I'll let that stand at that point, and let's move on.

A. And I guess you could----

Q. This catastrophic consequence, that's where you ended up? Go ahead.

A. Right. I guess in--there's something within--if I can speak about, there--you can--this is--let's see. You can--there's sins of omission and sins of commission, so to speak. You can do something that's wrong, or you can refuse to do something that's right. And what I saw my choice at that point was that if I--if I

went along with--with the orders that I was given, I would in fact be choosing to not do something that--to committing a sin of omission, so to speak. Having all the data that I gathered, having the perspective that I had, and ignoring it, would have been immoral and would have been something that I could not do.

ATC (CPT HARNEY): Objection, your honor.

IC (MR WEST): Just a moment. The wrong counsel is objecting now, your honor. We've got one----

MJ: Let's have--let's have one--one counsel do the objections.

Q. Go ahead.

A. And so I--I made a decision----

TC: No. We object to what she's testifying to at this point again, your honor.

MJ: I'm going to let her proceed. Go ahead.

A.. And so I, at that point, made a decision that I would have to withdraw my consent from what--from what was happening and--and so--so I did in an effort to--to try to--to educate and to hopefully mobilize again the community to do something about this in Washington and at the United Nations, so that this wouldn't happen.

Q. Without detailing or getting into the subject, did you consider the Nuremberg Principles at this time?

A. Yes, I did. Very, very strongly. In fact, that was one of the--one of the----

Q. I said without further elaboration.

A. Oh, okay.

Q. You did----

A. I did consider the Nuremberg Principles from my course at Fort Sam Houston, actually.

* * *

p. 1077, 8/7/91:

Q. (I.C.): Now I want to ask you this question very carefully. What was your intent at the time you went AWOL?

CAPT. HUET-VAUGHN: My intent at that time was--was to expose the nature of what I knew----

TC: Objection, your honor.

MJ: Restate your question.

Q. What was your intent at the time you went AWOL, absent without authority, from Fort Riley, Kansas, on January 30, 1991 [sic]?

TC: That's the same question, your honor.

Q. December the----

MJ: That's the exact same question. Let's ask a question that's relative [sic] to this offense.

IC (MR WEST): Yes, sir, it is. Her intent is very relevant.

MJ: With regard to these duties, what--what was her intent?

IC (MR WEST): What?

MJ: With regard to these duties, what was her intention in leaving?

IC (MR WEST): I'm not going to ask that question.

MJ: Okay.

IC (MR WEST): You may ask it.

MJ: Okay.

IC (MR WEST): But I object to it, and I object to your interference in that regard, and I object to the prosecution not permitting me to ask this lady what was her intent at the time she went AWOL, when that's the second element listed in your Military Judge's handbook as to the elements of the crime called desertion with the intent to avoid hazardous duty or shirk important service.

MJ: It--but that element doesn't have to do with what her --what her--what she was going to do, You can ask, you know, what she was going to do when--after she left, that's--that's a different matter.

IC (MR WEST): No. I'm asking her at the time she left what was her intent in going AWOL, what was her purpose in going AWOL?

MJ: Her--see-but you see, her--her purpose, that's a different matter.

IC (MR WEST): Was it to avoid hazardous duty? I'm sorry, your honor, go ahead.

MJ: That's a different matter.

Q. Was your intent at the time you went AWOL for the purpose of avoiding hazardous duty or important service in the Persian Gulf?

A. No, it was not.

Q. What was your intent?

A. My intent at--at the time that I left was to withdraw my consent from what I saw as an illegal and--and totally unnecessary catastrophe.

TC: Objection, your honor.

MJ: Sustained. Sustained.

IC (MR WEST): All right. I--I feel I must make an offer of proof as to this element, and I would prefer, if I may do so in closed court without the jury's presence.

MJ: We'll ask the jury to step into the deliberation room momentarily, please.

TC: All rise.

MJ: All rise, please.

[The court members withdrew fron. the courtroom.]

MJ: Please be seated.

IC (MR WEST): May I proceed, your honor?

MJ: The record should reflect that the members have withdrawn.

IC (MR WEST): May I proceed?

MJ: You may.

IC (MR WEST): Our offer-offer of proof at this time is that if this witness were permitted to answer this question, she would state that her intent at the time she went AWOL from Fort Riley, Kansas, on the night, I think, of December the 30th, 1990--'91--or '90, was to withdraw her support from Operation Desert Shield and to demonstrate by her--by her absence and by her unauthorized absence was to demonstrate and to expose what she felt were the illegal war plans of the United States of America to invade Kuwait [sic] and to destroy its civilian infrastructure, i.e. its economic civilian infrastructure that supported civilian life in Iraq, and that it was the intention of the United States government to destroy the power plants, the electric power plants, the sewage treatment plants, the water purification plants of Iraq, and the water treatment plants, for the purpose of destroying electricity and destroying fresh water supplies, so the civilian

economy would be wracked with ruin and damnation, and so thousands of civilians would die as a result thereof.

MJ: I'm going to stop you there, Mr. West. The--the record is resplendent with--with what you felt that she was going to do. We already have that on the record, and I've already ruled on this, and I think we're just taking up valuable time at this point. I'm not going to allow that. I've explained to you my view of the law on this point several times before. The intent that's referred to in that element is a willfulness; that is to say, that she consciously and willfully made a decision that she was not going to take part in that activity. What you're talking about is--is--is her rationale for making that, and that's not a defense, and we're not going into it on the record, sir.

IC (MR WEST): Oh, no. I know. I'm just--I think I'm entitled to make an offer of proof as to what she would testify to.

MJ: It's--it--we've already talked about all of that and you've made that offer in--in prior sessions. You've told me----

IC (MR WEST): I don't think----

MJ: You've told me at least three times what it was that was the basis for her moral, ethical, religious, philosophical, and professional differences with what was going on. And I've explained to you that my view of the law and, if I'm wrong, it's--it's not because I haven't studied it very, very carefully and--and haven't given every--every benefit of the doubt to

your position. And, if I'm wrong, we'll find out in the appellate parts of this case. But I know what you're saying. You've said it before. And we're going to move on, and we're not going to deal with that on the record unless and until we get to the point of extenuation and mitigation in this case, and then she can explain her reasons for making an--a conscious and willful decision that she was not going to go.

IC (MR WEST): All right, your honor.

MJ: I--I don't know how many different times I can say that and how--how much clearer I can make it.

IC (MR WEST): All right. I assume then that you're telling me that you don't need my offer of proof at this time?

MJ: That's correct.

* * *

p. 1086, 8/7/91:

Q. (I.C.): And you had a specific intent at the time you left to do certain things, right?

CAPT. HUET-VAUGHN: Right, but I--as----

Q. Don't tell us what they were.

A. No, I'm not, but as of December the 29th in the morning, I had already made my intent very clear to command here at Fort Leonard Wood, I thought.

* * *

p. 1094, 8/7/91:

Q. (I.C.) So you got on some national television, didn't you?

CAPT. HUET-VAUGHN: I--I did what I could to try to bring this information to the public, yes. And I was on--I was on a talk show, a daytime talk show with five other women, three supporting the war, three of us opposed to what was happening. I--I did national radio talk shows with different national radio programs. I did what I could. I tried to do as much as I could to--to try to educate about what I knew and to--you know, I'm--I'm a physician in social medicine and community medicine and what I mentioned to you about the concept of treating on a one-to-one basis, I mean that's very important, and I don't put--you know, I don't want to devalue that one-to-one interaction, but as a physician looking at my community I had to deal with the structures that were going to impact the health care of both the United States and the Middle East and possibly even the world through the environmental consequences, and so I took a public health approach.

TC: Objection, your honor.

MJ: Sustained.

Q. Go ahead.

A. Does sustained mean I can----

Q. Don't talk about that any more. Just go ahead.

* * *

p. 1106, 8/7/91:

Q. (I.C.) Now, you evaluated a lot of the Persian Gulf concept against the unjust war of the--doctrine of the Catholic Church?

TC: Objection, your honor.

MJ: Sustained.

* * *

p. 1119, 8/7/91:

Q. (TC [Cross-examination]) You received orders to deploy to Southwest Asia in support of Operation Desert Shield, didn't you?

CAPT. HUET-VAUGHN: Yes, I did.

Q. In fact, they're marked as--a copy of them are marked as prosecution Exhibit 3?

A. That's correct.

Q. And you left Fort Riley so you wouldn't have to support Operation Desert Storm or Desert Shield?

A. I left Fort Riley to withdraw my consent from that operation and also to expose the nature----

TC: Objection to what--all after that, your honor.

MJ: I--I think you know the--I mean, be more specific in your--in your response.

IC (MR WEST): Your honor, I think the witness has a right to explain her answer.

MJ: I--I--we're----

IC (MR WEST): You're cutting her off. He's cutting her off.

MJ: That's correct. That's correct.

A. I wasn't going to say anything but what you approved before.

Q. I'll tell you what. I'll ask the question and you just respond yes or no.

A. If I can, I will.

Q. And if you can't respond yes or no, and it requires some explanation, please say so.

A. Okay.

Q. And I--we'll see if that's a proper explanation, okay?

A. Okay.

Q. You received those orders that night you arrived at Fort Riley, correct?

A. Yes, I did.

Q. And when you left on the 30th, you left so that you would not have to deploy to Southwest Asia, didn't you?

A. No, I did not. I left so that I could--so that I could educate and expose the nature of what I saw occuring, and so that I could withdraw my consent from--from the policy that was occurring at that time.

Q. Isn't withdrawing consent simply a convenient way of saying that you didn't want to deploy?

IC (MR WEST): Objection. He's arguing with the witness.

MJ: He's leading the witness, and he can do that.

IC (MR WEST): But he's arguing.

MJ: Your objection is overruled.

A. Withdrawing consent means that I did not want to support Desert Shield, whether it was in Saudi Arabia, Germany, or the United States, or anywhere else. So, I mean, included within that set of refusal to support would be Saudi Arabia, yes.

Q. All right, so whether it was----

A. But the purpose----

MJ: Let's--I think that makes it clear.

Q. All right. So whether the Army was ordering you to go to Saudia Arabia or anywhere else, you weren't going to obey that order?

A. Whether the Army was ordering me to Saudi or whether they were going to tell me to stay put at Fort Riley to support Desert Shield or whether they were going to send me to Germany, I could not, in good conscience, support that policy, no.

* * *

p. 1128, 8/7/91:

Q. (MJ): I understand that, but no person in a position of authority in the Army----

CAPT. HUET-VAUGHN: No, no.

Q. ----granted you leave?

A. No, that's correct.

Q. All right. Could--I mean, if--if you had wanted to, you could have complied with those orders?

A. No. It's not a question of whether I----

Q. There was no physical reason that you couldn't? It was a matter of will? You--you determined of your own will that you were not, is that a fair statement?

A. Well, it was a matter of responsibility.

Q. I understand that, but you--you made a choice. You made a conscious choice?

A. I made a conscious choice to follow what I

considered to be the correct thing to do in the situation, yes.

Q. I--I understand that. But you could have--I mean, there was nothing physically that would--that kept you from----

A. Oh, physically wrong with me? I mean----

Q. You could--you could have done that if you had chose to do so?

IC (MR WEST): Objection. Your question is argumentative.

MJ: Thank you, Mr. West.

Q. Could you have done--was there anything other than your conscience, your--your philosophical views, your religious views, your ethical views, and your professional views, that kept you from--from obeying those orders?

A. Well, was there anything physical wrong with me that would have kept me from doing that? No. But everything else you've mentioned is basically----

Q. Everything I've mentioned, those----

A. That's me.

Q. But--but there was nothing that was keeping----

A. There was nothing physically wrong with me, no.

Q. You could have deployed?

IC (MR WEST): Objection to that. That again is argumentative. I think she's----

MJ: Thank you, Mr. West.

A. Well, I'm--I'm physically healthy, so I would--you know, I should--is that what you're asking me, was I able physically to do that?

Q. Yes. Yes.

A. Physically I'm able to do a lot, including that, but----

Q. And you chose not to?

A. And I chose not to do that.

* * *

p. 1130, 8/7/91:

REDIRECT EXAMINATION

Questions by the defense (Mr. West):

Q. Why did you choose not to?

A. I chose to--to perform what I considered a more important service to-- the American public and to try to educate it regarding the information that I had gathered and the catastrophic nature of what was happening.

Q. Was that your intent at the time you absented yourself?

A. Yes, that was my intent. My intent was to do what I could to prevent the war from starting.

* * *

Excerpt from p. 1209, Record of Trial, 8/8/91:

Q. (I.C.): All right. Now, Ms. Kidder, do you know Captain Huet-Vaughn in this case?

MARGOT KIDDER [defense witness]: Yes, I certainly do.

Q. Where did you meet her?

A. Well, I had heard through my sister of an interview she had given, explaining why she was obligated by ----

TC: Objection, your honor, as to the explanation why.

MJ: Sustained.

Q. All right. You----

MJ: What--what we're--we're not talking about the--her moral beliefs and so forth. That's not being litigated here today.

Q. All right. You heard about her making speeches somewhere? Is that----

A. Yes. And, therefore, because of what she said in her speeches--can I say that?

Q. No, you can't say that.

A. Okay.

* * *

p. 1380, 8/8/91:

MJ [charge to court members]: I will advise you of the elements of the offense alleged. You may find the accused guilty only if you are convinced that each element is established by legal and competent evidence beyond a reasonable doubt. The elements of the offense are: That at Fort Riley, Kansas, on or about the 31st of December 1990, the accused quit her unit, to wit: the 410th Evacuation Hospital; that the accused did so with intent to avoid hazardous duty and/or to shirk important service; namely, deployment to Southwest Asia in support of Operation Desert Shield; that the duty and service to be performed was hazardous and/or important; that the accused knew that she would be required for such duty and/or service; and, finally, that the accused remained so absent until on or about 2 February 1991. To consciously, intentionally quit one's unit to avoid hazardous duty and/or important service because of one's conscience, religion, personal philosophies, ethical or professional considerations, is not a defense. Any belief by the accused that what she might have been required to do could have been in violation of international law is not a defense.

* * *

p. 1396, 8/8/91:

AIC (MR. FONT): Yes, your honor. We have a defense

proposed instruction which I'd like to hand up to the court at this time.

MJ: Have it marked as an appellate exhibit.
[The reporter marked Appellate Exhibit XXXIII ["It is a defense in this case that the accused did not intend to avoid hazardous duty or shirk important service and instead had a different intent."].]

MJ: The time for that was during the session that we had for that purpose, Mr. Font.

AIC (MR FONT): Well, it came to mind, your honor, in light of your instructions.

MJ: That will be an appellate exhibit, next in order. [Mr. Font handed the exhibit to the trial counsel, then to the military judge].

MJ: That instruction will not be given.